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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1915.

No. 194.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

FULTON M. SKAGGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JULY 6, 1914.

(24,299)

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1 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Summons.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, a copy of which is hereto attached and herewith served upon you, and to serve a copy of your answer to said complaint on the subscribers at their law offices in the City of St. Paul in said county and state, within twenty days after the service of this summons upon you, exclusive of the date of such service, and, if you fail to answer to said com-
2 plaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in his complaint herein.

Dated February 15th, 1913.

BARTON & KAY,
Attorneys for Plaintiff.

816-818 New York Life Bldg., St. Paul, Minnesota.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Complaint.

Plaintiff for his complaint and cause of action herein against the above named defendant, states and avers:

I.

That the defendant now is and during all the times herein mentioned and referred to has been a corporation, and as such it has at and during all of said times, owned, maintained and operated as a common carrier of freight and passengers for hire, a line of railway extending in and through the states of Kentucky, Indiana, Illinois,

Iowa, Nebraska, Minnesota and other states, doing as such common carrier an interstate commerce business.

II.

That on the 13th day of January, 1913, and for some time prior thereto, plaintiff was in the employ of defendant, working for it in the capacity of brakeman upon freight trains owned and operated by the defendant over its said line of railway, between the city
3 of Clinton, in the State of Illinois and the city of Freeport, in the State of Illinois. That one of the stations of defendant's said line of railway between said Clinton and said Freeport, is known as Amboy, which is in the State of Illinois, at which place the defendant owns, maintains and operates as a part of its said line of railway, switching yards consisting of railroad tracks and switches upon and over which its freight and passenger trains operate.

III.

That defendant's main line track extends into and through the said station of Amboy, and adjacent to said main line, and connecting therewith is a track known as the passing track; that said passing track and the switch connecting it with the said main line track, were during all the time herein stated defective, dangerous and insufficient in that there was and is not sufficient, safe and adequate clearance between said passing track and the said main line track. That the defendant was careless and negligent in causing, permitting and allowing its trains to be operated over said tracks during the times herein stated.

IV.

That on said 13th day of January, 1913 the defendant did carelessly and negligently place and set a string of about eight cars on the said main line track and did carelessly and negligently place the same so close to said passing track and the switch connecting said two tracks, that an engine or car being operated from the
4 main line over said switch and on to said passing track would not clear said cars, and so close that employes of defendant riding upon the side of said engine, as this plaintiff had to and was doing at said time, would be knocked therefrom by said cars. That having so carelessly and negligently placed and set said cars on said main line track, the defendant did carelessly and negligently operate its locomotive engine over the said switch connecting said two tracks and onto said passing track, at which time plaintiff in the discharge of his duties as an employe of defendant, was riding upon the side of said locomotive engine, and by virtue of the said cars having been so left too close to said switch and passing track, plaintiff was knocked from his position on said engine and thrown to the ground, where he was run over by said engine and greatly crushed, bruised and injured, his right arm and his right leg being so crushed, bruised and injured that they had to be and were amputated, and plaintiff was otherwise greatly crushed, bruised and injured in and

about his back and body; that by virtue of the injuries plaintiff then and there received, he has ever since suffered and will in the future suffer great bodily pain and mental anguish, and has been totally and permanently disabled, crippled and injured.

V.

That all of the freight cars herein mentioned and the contents thereof, did come into the state of Illinois from other states,
5 and were going through and beyond the state of Illinois, and into other states; that the locomotive hauling said train and upon which plaintiff was riding at the time he was injured, was at said time being operated and used by the defendant in interstate commerce. That defendant's said line of railway and the said cars and locomotive engine heretofore referred to, were commonly and customarily used in hauling interstate commerce, and the said railway line was at and during all of said times an interstate highway.

VI.

That, by virtue of all the facts herein stated, plaintiff has been damaged in the sum of sixty thousand ($60,000.00) dollars.

Wherefore, plaintiff demands judgment against the said defendant for the sum of sixty thousand ($60,000.00) dollars, together with his costs and disbursements herein.

BARTON & KAY,
Attorneys for Plaintiff.

816-818 New York Life Bldg., St. Paul, Minnesota.

(Endorsed: Filed Mar. 22, 1913.)

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Answer.

The defendant for its answer to the complaint herein:

I.

Admits that the defendant is and at all times mentioned in the complaint has been a corporation, and at all said times has
6 owned, maintained and operated a line of railway extending in and through the States of Kentucky, Indiana, Illinois and other States.

II.

Admits that on the 13th day of January, 1913, and for some time prior thereto, the plaintiff was in the employ of the defendant in the capacity of a freight brakeman.

III.

Admits that the defendant's tracks extend into and through the station of Amboy in the State of Illinois; that on or about the 13th day of January, 1913, the plaintiff was injured by being knocked from a locomotive by other cars standing close to the track on which said locomotive was passing.

IV.

Denies that the lines or tracks of the defendant at Amboy or elsewhere were defective, dangerous or insufficient, and denies that defendant was guilty of any carelessness or negligence in causing, permitting or allowing trains to be operated over said tracks or in setting or placing any cars thereon, and denies that the injury of the plaintiff resulted from any negligence on the part of the defendant or its employees, and alleges that the accident and injury to the plaintiff aforesaid were caused by and resulted wholly from the carelessness and negligence of the plaintiff.

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V.

Alleges that prior to the commencement of the action above entitled, the said plaintiff, Fulton M. Skaggs, instituted an action against this defendant company in the District Court of Hennepin county in the Fourth Judicial District, in the State of Minnesota, in which action said plaintiff seeks to recover from this defendant damages on account of the said accident alleged to have occurred on the 13th day of January, 1913, and that the said action so instituted in the District Court of Hennepin county is based upon the same cause of action as is involved herein, and that at the time of the institution of this action there was another action pending between the same parties for the same cause, and that said other action is still pending.

VI.

Except as herein admitted, the defendant denies each and every allegation, matter and thing contained in the complaint.

Wherefore, the defendant asks that the plaintiff take nothing by this action, and for its costs and disbursements herein.

BUTLER & MITCHELL,
Attorneys for Defendant.

624 Endicott Building, St. Paul, Minnesota.

(Endorsed: Filed April 30, 1913.)

8 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant

Reply.

Now comes the plaintiff and for his reply to the answer of the defendant herein, states and avers:

That as to that part of the fourth paragraph of defendant's answer, alleging and charging that the plaintiff's injuries were caused by his own carelessness and negligence, this plaintiff specifically denies the same, and every part and portion thereof, and the whole thereof.

That as to the allegations contained in the fifth paragraph of said answer, this plaintiff denies the same and every part and portion thereof, and the whole thereof.

Wherefore, plaintiff reaffirms the allegations of his complaint, and continues to pray for the judgment therein demanded.

BARTON & KAY.
Attorneys for Plaintiff, 816-818 New York Life Bldg., St. Paul, Minnesota.

(Endorsed: Filed Mar. 22, 1913.)

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

This case came on for trial before Hon. Charles M. Stanton, J., with a jury, on the morning of Monday, May 12, 1913. Barton & Kay appearing on behalf of plaintiff, and Mr. C. M. Bracelen on behalf of defendant.

Jury empaneled and sworn.

9 Case opened on behalf of plaintiff by Mr. Barton.

Mr. BARTON: Before the plaintiff is sworn, if the Court please, counsel have been trying to eliminate some things in this case, and we have agreed upon a statement of facts of some matters that are material in the case, and I will just read them for the record, if the Court please: It is admitted in this case by both parties that there were, including the caboose, fifteen cars in this train when it arrived at Amboy, Illinois; that the cars were all loaded; that nine of the said cars were, with their loads, destined for places without the state

of Illinois; that two of the other cars in said train came, with their loads, from Cass, Indiana, into Illinois, and these last named two cars were, with their loads, set out of the said train at Amboy to be picked up by another train being operated by defendant, and taken, with their said loads, to their destination, which was Stockton, Illinois.

FULTON M. SKAGGS, sworn in his own behalf, testified:

By Mr. BARTON:

Q. How old are you, Mr. Skaggs?
A. Twenty-three—will be this coming June.
Q. Will be when?
A. This coming June.
Q. Where were you born?
A. In Ohio.
Q. Your first work was of what nature?
A. Bridging.
Q. Well, I mean before you went into the railroad work.
10 A. Farming.
Q. Farmer. And then after you quit the farming what did you go to doing?
A. I went to bridging.
Q. For what company?
A. Illinois Central.
Q. Give us some idea of what you mean by bridging; what was your work?
A. Well, putting in steel and woodwork, driving piles and such as that.
Q. How long did you continue at that bridge work?
A. Well, about two years, I guess.
Q. Now, at the time you were working at the bridge work, where were you living, or where was your headquarters?
A. Why, most anywhere on the road.
Q. Most any place?
A. Yes.
Q. What different states did you do that bridge work in?
A. Well, Iowa and Illinois, some in Kentucky and Indiana—all over the system.
Q. And it was all on the railroad line of the Illinois Central?
A. Yes, sir.
Q. What next did you do after this bridge work?
A. I went to firing.
Q. For what company?
A. The Illinois Central.
Q. And how long did you work as a fireman?
11 A. Pretty near two years.
Q. On what part of the road did you do that work?
A. On Tennessee Division.
Q. Was that all in Tennessee, or did you run out of Tennessee some?

A. Run out of Tennessee.
Q. Into what other states did you run?
A. Kentucky and Illinois.
Q. How did you happen to quit the fireman work?

Objected to as immaterial.
Objection overruled.
Exception by defendant.

A. Well, the business got dull, you know, and wasn't no business going on much and so they cut down the help, you know, and so I left and went up in Illinois there and went to braking.
Q. Now, where did you go to go braking?
A. I came to Freeport.
Q. And did you get employment there?
A. Yes, sir.
Q. For what company?
A. Illinois Central.
Q. And did you go then to the work of braking?
A. Yes, sir.
Q. Now, what was your first trip as a brakeman?
A. My first trip was out of Freeport on 52.
Q. To or for what place?
A. Clinton.
12 Q. Out of Freeport on 52 for Clinton, both in Illinois?
A. Yes, sir.
Q. And what was 52?
A. 52 is a kind of merchandise, a manifest train.
Q. Freight?
A. Yes, sir, freight.
Q. And when did you start out on that run?
A. We started Saturday morning—or Friday morning, I forget which—at 8 o'clock we was called.
Q. And what day of the month?
A. It was on the 12th, I guess,—no, on the 10th.
Q. On the 10th of February of this year?
A. Yes, sir.
The COURT: February?
Q. February, yes, sir, this year. That is right, isn't it?
A. Yes, sir, that is right.
Q. Now, you say you were called for 8 o'clock—morning or evening?
A. Morning.
Q. Do you recollect what time you did leave Freeport?
A. Why, we left about 11:30, I think.
Q. In the forenoon?
A. In the forenoon, yes, sir.
Q. And did you get to Clinton?
A. Yes, sir.
Q. What time did you arrive at Clinton?

A. About 12:30, I should think.

13 Q. Was this February or January? Mr. Kay calls my attention——

A. January.

Q. Then it is my fault. I was thinking it was February, I don't know how I got it in my head. January, yes. And you got to Clinton about 12:30, you say?

A. Yes, sir.

Q. Now, that was at midnight, was it?

A. Midnight, yes, sir.

Q. Was that of the same night, now, that you left?

A. Yes, sir.

Q. You left, you said, along about noon time, Freeport, and got into Clinton about midnight the following night?

A. Yes, sir.

Q. There wasn't anything unusual, I believe, happened on that trip down?

A. No, sir.

Q. Had you ever worked as a brakeman before that trip?

A. No, sir.

Q. Had you ever been over that piece of road before that?

A. I had never worked over it, I had rode over it once or twice.

Q. How long were you at Clinton?

A. Well, we laid over there until Sunday afternoon, we were called at 1:30.

14 Q. Now, you say Sunday afternoon, that would be the first afternoon following the midnight that you got in there; is that right?

A. Yes, sir.

Q. I have spoken of Clinton being south of Freeport; is that correct?

A. Yes, sir. That is the division.

Q. So the general run of the track there is north and south?

A. North and south.

Q. With Freeport at the north end and Clinton at the south end of that division?

A. Yes, sir.

Q. Well, now, you say you were called about 1 o'clock on Sunday afternoon; what time did you leave Clinton?

A. Left about 2:30.

Q. And that was, then, on your return trip to Freeport?

A. Yes, sir.

Q. And on the 13th day of January of this year?

A. Yes, sir.

Q. Did your train have a number coming back?

A. Coming back—they come back as 72.

Q. Came back as 72?

A. Yes, sir.

Q. And a freight train, of course?

A. Yes, sir.

Q. Was it any different from the train you took down?

A. Well, no, not any different at all.

Q. The same class and kind of train going back to Free-
15 port that you had going south from Freeport?

A. Yes, sir.

Q. Now, had there anything unusual happened on that trip until you got to Amboy?

A. Coming north?

Q. Yes.

A. Well, no; we had a lot of work to do along the road, picking up and setting out.

Q. What time did you arrive at Amboy?

A. We arrived there at about two.

Q. That would be the morning of the 13th?

A. 13th.

Q. The morning of the 13th of January. Now, what kind of a night was that with reference to weather conditions and light conditions?

A. Well, it was a dark night; dark, cold, and wind blowing considerable—bad night for working on the road, out on the road.

Q. Did you know before arriving at Amboy that there was any work, and if so, what, to be done at Amboy?

A. Yes, sir, the conductor said we had two cars to set out there. I asked him where they were, and he said, "Two behind 7."

Q. This was then, before you got to Amboy that he told you that?

A. That is when we left La Salle, Illinois.

Q. And how far was that from Amboy?

A. About thirty miles, I guess.

Q. Was it the last station that you had stopped at?

16 A. No, sir, we stopped at another place, I don't know where it was though, but we didn't do no work.

Q. You were working as head man on that train?

A. Yes, sir.

Q. Who was your rear brakeman?

A. Buckley, I think is his name.

Q. Buckley or Buckton?

A. Buckton, yes, Buckton.

Q. B-u-c-h-t-a, Mr. Kay says.

A. Yes, sir.

Q. Did you know him before that night?

A. No, sir.

Q. Or before that trip, rather?

A. No, sir, I didn't know him before that trip.

Q. He went south on the trip with you?

A. Yes, sir.

Q. And was that the first time you had ever seen him?

A. Yes, sir, the first time.

Q. Did you know your conductor?

A. No, sir.

Q. What was the conductor's name, or did you learn it?

A. Lichtenberger.

Q. And you didn't know him before that time?

A. No, sir.
Q. Did you know your fireman or engineer?
A. No, sir, I didn't know them either.
Q. Do you know what their names were?
17 A. I don't remember the fireman's name; the engineer's name was Schmidt.
Q. Had you ever done any work or stopped off at all at Amboy before this night?
A. Why, we stopped as we went down there, but it was in the day; we didn't do no work at all, just stopped to get orders.
Q. Your train, then, when you were going north did come to a stop at Amboy?
A. Yes, sir, it did.
Q. Had you anything to do with the giving of the signals to stop it, or was it just stopped by the engineer?
A. We stopped there to get orders and set out two cars.
Q. Well, now, after you had stopped what was the first thing that you did?
A. I dropped off on the platform and waited until nine cars come along, and caught the rear end of the nine cars, and when he came to a stop, why, I cut the air-hose and pulled the pin.
Q. Cut the air-hose, pulled the pin, and then what was done?
A. Proceeded ahead.
Q. That would be northward?
A. Yes, sir.
Q. With the nine cars?
A. Nine cars.
Q. What did you do then?
A. I threw the switch, and Buchta he was down on the other end while I come back with the other cars.
18 Q. You went north over the switch, then the engine with those nine cars stopped and you threw the switch to leave them go south again on some track?
A. Yes, sir.
Q. Well, having thrown the switch, what did you do then?
A. Backing up.
Q. How did you do that?
A. I gave the signal.
Q. What were you using to give the signals with?
A. A lantern.
Q. You were on which side of the track at that time?
A. On the engineer's side.
Q. And that would be the right-hand side as you were facing north?
A. Yes, sir.
Q. And this track that you did go down in on, was that on the engineer's side or the fireman's side?
A. Well, it was on the fireman's side going down.
Q. That is, you went back south, then on that track it would be going on the west side of the main line which run north and south?
A. Yes, sir.

Q. You threw the switch and then you gave the back-up signal to the engineer, and he started back?

A. Yes, sir.

19 Q. Then what did you do?

A. I was watching for the rear man's signals down in the yard.

Q. Well, did you remain there or did you get on those cars to ride back with them?

A. I rode the cars back.

Q. What part of the string of nine cars did you ride on?

A. I was riding on the seventh car.

Q. That is the seventh car from the engine?

A. Yes, sir.

Q. That would be the car where you would make the cut of those two cars, off, then?

A. Yes, sir.

Q. Did that have anything to do with the reason why you were on the seventh car?

A. Well, I could see the main line in there, so I caught the seventh car so when it stopped I could cut off and proceed back to the train.

Q. And then you were getting signals from the rear brakeman, Buchta, back down in the——

Mr. BRACELEN: Just a moment. I don't think he so testified, and it is leading.

Q. Were you getting signals? I understood you to say you were.

A. Yes, sir, I was getting signals.

Q. You were getting signals from him?

A. Yes, sir.

Q. Down in the yard you said?

A. Certainly; I wouldn't have backed up if I hadn't.

20 Q. You wouldn't have backed up if you hadn't got a signal?

A. No, sir, if I hadn't got a signal from him.

Q. Did you know where the two cars were to be taken out?

A. Well, he was lining up—I didn't know the yard; he said he would line up, to go past the switch and come back, and everything would be lined up, and watch him.

Q. That was his order to you?

A. Yes, sir.

Q. And did you watch him?

A. I did.

Q. Then when you would get signals from Buchta what would you do?

A. I would give the signal to the engineer.

Q. The same signal, or not?

A. The same signal, yes, sir.

Q. And you proceeded then south how far?

A. Oh, probably middle ways of the yards.

Q. And what did you do then?

A. We come to a stop and cut those cars off.
Q. And upon whose signal did you come to a stop?
A. The rear man's.
Q. He gave the stop signal, and what did you do then?
A. I gave the same signal, and stopped.
Q. Then after you did stop, what did you do?
A. I cut the cars in two, cut the air-hose and pulled the pin and gave the engineer a sign to go ahead.

21 Q. Who did all that?
A. I did that myself.

Q. Where did you make the cut?
A. The seventh car,—behind the seventh car.
Q. That left, then, two cars back on that track?
A. Yes, sir.
Q. Then what did you do?
A. I proceeded ahead, got my switch and come back on the main line.
Q. Now, you say you proceeded ahead; that means you proceeded in what direction?
A. North.
Q. And how did you go—walking or riding?
A. I rode.
Q. On what?
A. The rear car.
Q. Of these seven cars you had hold of?
A. Yes, sir.
Q. Until you got over what?
A. The switch connecting with the main track.
Q. And then what did you do?
A. I threw the switch and lined it up for the main track and backed up.
Q. How did you do that?
A. I gave signals.
Q. Very well. Just assume, now, we don't know anything about this, you know——
A. Yes, sir.
Q. —you gave a signal after throwing the switch to back up, and then what?
A. The engineer backed up.

Q. And where did you back to.

22 A. Backed down the main line towards the other cars.

Q. That is, the balance of your train?
A. Yes, sir.
Q. And then what?
A. The conductor gave me a signal—I thought it was he, I really didn't know, but I went by the signal, and stopped.
Q. What kind of a signal did you get?
A. He gave me a stop signal.
Q. With what?
A. His lantern.
Q. And what did you do then?

A. I went down to see what he wanted.
Q. Well, you repeated that signal, did you?
A. Yes, sir.
Q. And did your train come to a stop then, and did your engine and those seven cars——
A. Yes, sir, come to a stop.
Q. Then what did you do?
A. I goes down to see what he wanted.
Q. Where did you go?
A. I went to the office, to the depot.
Q. Whom did you find there?
A. I found the conductor.
Q. And what did he have to say to you?
A. I asked him if that was him give me that signal, he says, "Yes, we want to pick up a few cars here."
Q. Who said that, now?
A. The conductor. He says, "Go back on the same track
23 you was on and get hold of those two where you put them in there, and we will take those out," he says, "and then kick those two back there in the yards."
Q. Now, did the conductor say anything more to you at that time?
A. He said he would be over there against the time I got there with the engine, and tell me the cars that were the ones to be picked up.
Q. Now, you have used the language "Go back on the track where you had left the two cars, and hold on to them"; did you understand what he meant by that?
A. Certainly, yes, sir.
Q. What did he mean?
A. Why, he meant to couple on to those two cars that we had set in there, take those cars out we was to pick up and kick in those two cars in the train we was to set out there.
Q. Well, having so received that order from the conductor, what did you do then?
A. I went ahead to the engine.
Q. Now, the engine was standing where at that time?
A. On the main track.
Q. On the main line track, and coupled to anything?
A. No, sir, it wasn't coupled; it was pretty close, but wasn't coupled.
Q. I don't know whether you understood me. Was your engine coupled——
A. Well, you mean did I couple to the other part of the train?
24 Q. No, your engine, coupled to anything?
A. Just coupled to those cars that backed down there, yes, sir.
Q. Were those seven cars coupled to the balance of your train?
A. No, sir.
Q. So the time you went down to the depot office to see the con-

ductor your engine was standing on the main line track with the seven cars attached to it that you had been handling and setting out those two?

A. Yes, sir.

Q. Well, you say, now, after getting that order from your conductor you went back to your engine; what did you do then?

A. I went back to cut the engine off to go down in the yards, and the rear man was on the opposite side and asked me what I was going to do and where I went, so I told the conductor we wanted to pick up a few down on the same track where we had put in the two cars. He says, "How many?" I says, "I don't know," I says. He was counting the bills when I left, and said he would be over there. And so I pulled at the pin, and asked him—I was talking to him during the time, and I didn't get the pin——

Q. Now, what do you mean you didn't get the pin?

A. Well, I mean I didn't uncouple, I didn't pull the pin out of the draw-head.

Q. You uncouple cars how?

25 A. Well, we uncouple with a brake-rod there—not brake-rod, but a hand rod coupling there.

Q. The rod that comes from the draw-bar out to the side or near the side of the car?

A. Yes, sir.

Q. With a lever on the end?

A. Yes, sir.

Q. And when you speak of pulling the pin you mean taking hold of that lever and trying to lift the pin in the draw-bar?

A. Yes, sir.

Q. And lifting that pin does what?

A. Why, it uncouples the train.

Q. And you tried to do that, you say, and wouldn't——

Mr. BRACELEN: No, no, no, no, he didn't say "wouldn't" at all.

Q. Very well. Very well. We will try and please you. Did you get it uncoupled?

A. I didn't. I—he cut the air-hose while I was pulling, jerking at the pin.

Q. Who uncoupled the air-hose?

A. The rear man was breaking the air-hose while I was pulling the pin.

Q. Now, perhaps at that point—What do you mean by the "air-hose"?

A. Well, the air-hose is connected in the train.

Q. What is the air-hose for?

A. Well, for the air of the train.

Q. What is the air for?

A. Stopping.

Q. Brake power?

26 A. Brake, yes, sir.

Q. So that there are two things to do in uncoupling cars in a train?

A. Yes, sir.

Q. One is to uncouple the air-hose?
A. Yes, sir.
Q. And the other is to uncouple the draw-bars?
A. Draw-bars.
Q. Now, how do you uncouple the air-hose? You have told us how to uncouple the cars?
A. Well, we turn the cock-valve there and cut the air off and then break the hose.
Q. How do you break the hose?
A. Pull up on it.
Q. Where did you have to go to break the hose?
A. Well, right behind the cars you are cutting off and right behind the engine you are cutting off.
Q. Oh, between the two?
A. And between the two.
Q. Now, you say the other brakeman was uncoupling the air-hose while you were trying to uncouple the draw-bars?
A. Yes, sir.
Q. Did he get the air-hose uncoupled?
A. He did.
Q. And you say you didn't get the cars uncoupled?
A. I told him, I says, "Look out, I am going to take a little slack and uncouple," and he says, "Wait a minute, I can get it over here," and he did; he pulled the pin himself and he says, "Go
27 ahead." And I starts ahead and I didn't know whether those cars were clear or not going over into 4, and I asked him, and I didn't get the right answer to what I thought, and so I stops the engine and gets off the engine and asked him again, and he says, "They are clear a mile, go ahead, and if we don't get out of here the 16-hour law will catch us before we get into Freeport."
Q. Now, did you understand what he meant when he spoke of the 16-hour law?
A. Certainly, yes, sir.
Q. What?
A. Well, he meant if we had a tie-up on the road before we got in that we would be on the road 16 hours before we got to Freeport. We were supposed to tie up.
Q. You knew of a law that you could only work 16 hours, is that the idea?
A. Yes, sir.
Q. Tie up before you got to the end, 16 hours?
A. Yes, sir.
Q. Very well. What did you do then?
A. Well, I went ahead and throwed my switch and come back.
Q. Now, what switch was that you threw at that time?
A. That was the main line switch.
Q. This same switch you had passed over twice before?
A. Yes, sir.
Q. And what did you do after throwing the switch?
28 A. I gave a signal to back up.
Q. Now, that was simply the engine?

A. Yes, sir.
Q. What did you do then?
A. Well, I caught the rear end of the tank.
Q. On which side?
A. Engineer's side.
Q. That would be the east side of the main track and right-hand side facing north?
A. Yes, sir.
Q. What did you do then?
A. I was backing up looking for his signal.
Q. Looking for whose signals?
A. The rear man, the flagman.
Q. Did you know where he was?
A. I didn't know where he was only when I saw him give a signal.
Q. Go on, tell us what followed.
A. Well, I started to back, and I didn't get back very far, we hit the head car that we had cut the engine off, and I was caught between; I was caught between the tank and the car, and that knocked me off of the tank, and I fell through and the tank coupled to the engine ran over my foot and arm.
Q. That is, which arm and which foot?
A. The right arm and right foot.
Q. And what then?
A. Well, I was down underneath, that was all that I knew.
Q. The car, you say, came against the tender that you were riding on?
29 The COURT: That car was on the main track, and the engine on the side track at that time?
WITNESS: Crossing over.
Q. And you were going in on that track for the purpose of carrying out, as I understand it, the conductor's order to go back where you had left the two and get hold of them and then pick up some behind them?
A. Yes, sir.
Q. What other injury, if any, did you receive besides having your right arm and right leg run over?
A. Well, I was hurt in the back.
Q. Where in the back?
A. Across my shoulders and down here (indicating).
Q. Any place else?
A. No, sir, only my foot and arm and back.
Q. Now, where were you taken then from that place?
A. Amboy hospital.
Q. And what was done for you there?
A. Well, surgeons were called, and it seemed necessary for an amputation, I guess.
Q. And what did they do?
A. They did; they amputated my foot eight inches below the knee.
Q. That is your right leg?

A. Yes, sir, and my right arm six inches below the shoulder.
Q. That is, then the elbow was taken off?
A. Yes, sir.
30 Q. Six inches below your shoulder?
A. Yes, sir.
Q. So that you now have a stump of six inches to your right arm and eight inches below the knee on your right leg?
A. Yes, sir.
Q. You are wearing an artificial leg?
A. Yes, sir.
Q. How long were you in the hospital?
A. Three weeks and one day.
Q. What is the condition of your stumps now?
A. Well, they are awful tender, bother me a good deal and pain.
Q. How?
A. In pain, and something like the cramp, you know.
Q. Cramp?
A. Yes, sir.
Q. And anything else, any other trouble that you are having with them?
A. No, sir, no other.
Q. How are you getting along with the artificial limb?
A. Well, I get along very well.
Q. Does your stump get sore from the use of it?
A. Yes, sir.
Q. How does that affect you?
A. Well, if I try to walk a good deal or walk any ways, you know, why, it gets sore then and swells up, you know.
31 Q. How about your back, how long did that trouble you?
A. Well, the back never troubled me as much as my limbs.
Q. Well, did it bother you for some time afterwards?
A. Yes, sir, it did, for some time.
Q. Do you suffer any from it now at all?
A. No, I haven't in the last two weeks.
Q. What wages were you to receive for that work?
A. Well, different; it was on the average the work you did.
Q. Well, how were you to measure out your wages?
A. Mileage.
Q. By mileage?
A. Yes, sir.
Q. How much a mile?
A. $2.78 I think.
Q. $2.78 a hundred miles?
A. Hundred miles, yes, sir.
Q. How far was it from Freeport to Clinton?
A. 162 miles, I think it is counted.

Cross-examination.

By Mr. BRACELEN:

Q. How far did you say it was between Clinton and Freeport?

A. Well, I don't know how far it was; 162 miles is what the
call it.

Q. Mr. Skaggs, as I understood you, when you were bac
32 ing up, riding on the engine and immediately before yo
got caught you were looking for the rear man, the flagman
A. Yes, sir.
Q. And by the flagman you mean the rear brakeman on th
train?
A. Yes, sir.
Q. Buchta?
A. Yes, sir, the rear brakeman.
Q. There was a street crossing of the city of Amboy back betwe
this switch and the station; that is correct?
A. I suppose so, I don't know.
Q. And you were looking back for the flagman, Buchta, the oth
brakeman on this train because you knew he belonged, as flagma
back at that street crossing; isn't that correct?
A. Yes, sir, that is correct.
Q. And if he was performing his duty, as you understood it,
was back there guarding that crossing at night because there was
gateman on duty at night?
A. I didn't know whether he was guarding the crossing or n
or whether he was getting the switches lined up down in the ya
for me to come back.
Q. But, Mr. Skaggs, you didn't get my question. I didn't a
you whether he was doing it or not, but I asked you whether
wasn't your understanding that it was his business to be back th
at that street crossing, guarding the crossing at that tim
33 A. Guarding the crossing?
Q. Yes, stationed at the crossing as flagman.
A. Well, I don't know whether he would be back there guardi
the crossing or not. You can cut a crossing, you see, and wo
have to stay with it.
Q. What do you mean by cutting a crossing?
A. Cut the train in two and pull the clearance for passing.
Q. Yes, but you were looking back for the flagman at the ti
as you were backing up and just before the accident happened?
A. Yes, sir.
Q. And when you used a while ago the word "flagman" you h
in mind the fact, did you not, that it was his duty to be flagging th
crossing at that time, and that is why you call him the flagma
isn't that right?
A. No, sir, I don't know whether—That isn't his duty, to st
there at that crossing and flag it, it is his duty to cut that crossi
to see that it is done, and help the other man in the yards.
Q. You referred to him a while ago as a flagman, and that
the first time that you have spoken of him as a flagman in th
testimony, isn't it?
A. Well, isn't he a flagman?
Q. I am asking you, Mr. Skaggs.
The COURT: Answer the question.

A. On the main line.

Q. Yes, on the main line?

57 A. Yes.

Q. Exactly, so that now having left the two cars down in the yards, you go back with the engine and seven cars upon the main line again and you again throw the switch, lining it up with the main line?

A. Yes, sir.

Q. Exactly. You threw the switch yourself?

A. I did.

Q. And you gave the engineer a backup signal yourself?

A. Yes, sir.

Q. And he backed up on your signal down upon the main line?

A. Yes, sir.

Q. How far down did he back?

A. Oh, we backed down a good ways.

Q. Where was the engine with reference to the switch, the main line switch, when it stopped?

A. Why, I can't say.

Q. Well, what is your best recollection?

A. Well, I couldn't say; I don't know how far the switch was from the engine at the time.

Q. Well, you threw the switch, lining it up with the main line, and gave a back-up signal and did what?

A. Backed up.

Q. The train backed up?

A. Yes, sir.

Q. Did you board the train?

A. I rode the rear end.

Q. You rode the rear end?

58 A. Yes, sir.

Q. Where was Buchta?

A. Why, he was there in the yards somewhere, I suppose.

Q. He was there in the yards somewhere?

A. Yes, sir; I didn't see him just at the time.

Q. You didn't see him then?

A. No, sir.

Q. So far as you know you were in charge of that engine and those seven cars yourself, and the engineer was taking all signals from you?

A. Well, I was looking for a signal from other places, too.

Q. Yes, but I didn't ask you about that. So far as you know, Buchta wasn't on the train—that is, when I say train I mean the engine and this string of cars, seven cars,——

A. Yes.

Q. —at the time you were backing down there on the main line again, was he?

A. He probably might have been on the other side.

Q. He probably might have been. You said a moment ago that he might have been down in the yards somewhere?

A. He might have been, yes.

Q. Well, now, to get at your testimony, it is you don't know where Buchta was; is that it?

A. Why, no.

Mr. BARTON: He has told you that several times.

Q. Is that it?

A. I have told you, certainly.

59 Q. You don't know where he was?

A. No, sir.

Q. And you can't tell us where the engine was when it stopped on this last backward movement?

A. Well, I couldn't tell you how close it was to the switch nor how far it was from the switch.

Q. Or how far it was from the switch. Can you tell us how far the rear car upon which you had ridden down there was from this city street crossing there?

A. I don't know; I didn't see the crossing there.

Q. Can you tell us how far it was from the station itself?

A. To where?

Q. To this car, this seventh car upon which you were riding when it stopped?

A. Well, it wasn't so far to the station.

Q. Now, the next movement of the engine was a movement made, as I understand you, after you went down to the station, talked to the conductor and were told by him that there were some cars out in the yard to be picked up?

A. Yes, sir.

Q. Hadn't the conductor told you and hadn't the matter of cars to be picked up in the yards been discussed when all three of you first went into the station upon arrival at Amboy?

A. Did he tell us then?

Q. Yes, or was it discussed between you there?

A. Why, he never told me anything like that.

60 Q. You were all three there, you and Buchta and the conductor?

A. The conductor went into the station.

Q. Didn't you go into the station also?

A. Yes.

Q. I say you were all three in the station when you arrived at Amboy?

A. And he says what?

The COURT: Just answer that first.

WITNESS: Yes, we were all three there.

Q. Now, then, my question is: Wasn't the matter of cars to be picked up as well as of cars to be set out referred to and discussed there in the station at that time?

A. Not until I came back from setting the two cars out, was the first I knew of it.

Q. Your testimony is that you didn't know that there were cars down in the yards to be picked up until after you had set out the

Q. Just answer the question.

A. Yes, sir, he is a flagman.

Q. And you referred to him as a flagman a while ago,
34 having in mind that you were looking back for him, as you testified, because you had in mind that he would be back flagging the crossing at that time?

A. I wasn't talking about him flagging the crossing.

Q. I see. Now, Mr. Skaggs, isn't it a fact that Buchta, when you backed down with those seven cars,—according to your testimony there were seven—upon the main line, after having cut off the two cars, got on the seventh car and rode back with it to the crossing, this street crossing of the city of Amboy, and stayed there guarding that crossing from that time, while you performed these other operations?

A. I didn't know where he was at. I didn't see him half of the time.

Q. Well, you know that the rules of the company—the written rules of the company—required him to be back there doing that, don't you?

A. Required him to be there at the crossing?

Q. Yes, at that time.

A. Well,—at that time?

Q. Yes.

A. I was backing up there myself at that time.

Q. You were backing up, and you were at the head end, near the engine?

A. I was on the rear end of the seventh car, backing up.

Q. Mr. Skaggs, I show you a photograph marked Def't's Ex. 1. If you will just examine that. Does that appear to be a
35 picture of the place near which or at which this accident happened at Amboy, Illinois?

A. Why, I couldn't say; I wouldn't know one yard from another; I am not acquainted.

Q. Now, if you will just let me call your attention to some things on it which I think you may remember. You notice I am pointing to a building. If you will just examine that. Doesn't that look to you to be the station of the Illinois Central at Amboy?

A. Why, I couldn't say, I never took no examination of the place, never worked there and never started to work there but once, and that was the night I was hurt.

Q. You had passed through Amboy how many times before the accident?

A. Why, I went through there twice.

Q. Twice before the accident?

A. Yes, sir.

Q. I don't mean only while you had been braking, Mr. Skaggs, but at any time ever in your life.

A. Well, that is what I mean; twice before I ever went working. I wasn't working then. I wasn't on duty when I passed through there twice. Two times before.

Q. So that, all told, you had been through the station, passed the

station at Amboy only three times before the time of the accident all together, is that right?

A. Three times?

Q. Yes.

36 A. Well, I went past there a couple of times, then I came by there on freight in service.

Q. Yes, and then at the time of the accident you were on the return trip in service?

A. On the return trip in service.

Q. Well now, have you been through there since the accident?

A. Well, I left there—I went to Freeport when I was taken from the hospital.

Q. When you left the hospital you went to Freeport?

A. Yes, sir.

Q. Did you go over the Illinois Central?

A. Yes, sir.

Q. Were you in Amboy and around town there at all after you were able to get out of the hospital?

A. No, sir.

Q. Before you went to Freeport?

A. No, sir, taken to the train in a chair, a wheel chair.

Q. When you went to Freeport after the accident.

A. Freeport after the accident.

Q. You went down to this same station at Amboy in a wheel chair?

A. Yes, sir.

Q. Well, now, from those times that you have been there, aren't you able to identify that photograph as——

A. I couldn't identify that photograph any more than I

37 could La Salle or Bloomington or any yards like that; I couldn't say, for I didn't pay close enough attention to them.

Q. Well, you recall from the day trip that you made on the down trip from which you were returning at the time of the accident that there is a street of the city of Amboy between this switch and the station?

A. I couldn't say; I got off and flagged where the road crossing—where that other road crosses the Illinois Central, I went down and flagged there.

Q. I am not asking about the crossing of two railroads there.

A. Well, I was going to tell you about that.

Q. I don't want you to; I am not asking about that.

Mr. BARTON: Well, you ought not to be afraid. Let him tell that.

Mr. BRACELEN: Oh, I am not afraid or anything, but I am asking now—if he wants to tell after a while about another railroad crossing this railroad, why, I will have no objection if it has any bearing upon the lawsuit at all.

Q. What I want to know about now and want the jury and the Court to know about now is not a railroad crossing, but a street crossing between the switch and the station.

A. I couldn't tell you.

Q. That is definite enough. Showing you Def't's Ex. 2, are you able to state whether or not that is a photograph of the street of Amboy which crosses this main track and the passing-track between the switch where you were hurt and the station?

38 A. I couldn't tell you.

Q. You can't tell?

A. No, sir.

Q. You can't answer, as I understand you, Mr. Skaggs, one way or the other whether these photographs do or do not show the location there?

A. I can't say.

Q. You hadn't had your attention in any particular way directed to the locations there, and therefore you don't know?

A. I don't know, no, sir.

Q. Well, do you recall whether this is true or not: that there is a street crossing these Illinois Central tracks——

A. I couldn't tell you whether——

Q. Just a moment. I hadn't finished the question—crossing these Illinois Central tracks north of the station, where there is a little house or cabin for the street watchman or attendant, and where there are gates which raise and lower when they are operated, for the safety of traffic over the street?

A. I couldn't say whether there is an avenue crosses there at all or not.

Q. Do I understand you to say you don't even recall whether there are gates and a street crossing there at all or not near the station?

A. I do not know whether there are gates or a street crossing.

Q. I show you now, Mr. Skaggs, a plat, marked by the

39 reporter, Def't's Ex. 3. Just hold that. I call your attention to a portion of the plat marked "Passenger Depot" and a track marked "Main track," and a track which on the plat is next below the main track, marked "Passenger track," and a street intersecting the railroad track marked "Division street." Now, leaving out all reference to the portion marked street, I ask you whether or not this plat, to your recollection, shows the main track, the passing track, and up here at the left of the plat, a switch, which corresponds to the tracks, station and switch at Amboy, Illinois?

A. I don't know nothing about the yards there.

Q. You don't know anything about the yards there?

A. No, sir, I do not.

Q. You know there is a station there?

A. Yes, sir, I suppose so——

Q. Well, don't you know?

A. Well, I have seen one there.

Q. Well, it is there. Don't you know it is there then?

A. Well, I don't know whether it is there now or not.

Q. I see, you don't know whether it is there now or not?

A. No, sir.

Q. But your last knowledge is that there is a station at Amboy?

A. Yes, sir.

Q. An Illinois Central passenger station?

A. Yes, sir.

40 Q. And your last knowledge is that there is a main track there?

A. Certainly, yes, sir.

Q. Yes, you went in on that main track to this station on the night of the accident, didn't you?

A. Yes, sir.

Q. And you know that there is also a passing track there, don't you?

A. Well, I couldn't say whether there is a passing track there or not.

Q. Don't you know about that?

A. No, sir, I don't know nothing about that.

Q. Do you know whether there is a track in the yards there called track No. 4?

A. Only what I was told.

Q. You have testified to having switched two cars, the eighth and ninth cars of the train, upon track No. 4; do I understand that that testimony, so far as it identifies the track as No. 4, is merely what you have been told by somebody since?

A. Yes, sir, at the time.

Q. Oh, at the time you were told?

A. At the time.

Q. Before the accident or after the accident?

A. Before the accident.

Q. Well, now, between track No. 4 and the main track upon which you ran into the station, there were other tracks, were there not?

A. Why, supposed to be, crossing over, going to one, two, three and four.

Q. Supposed to be. Well, do you know whether there were tracks 1, 2, 3 and 4 there at the time?

41 A. I crossed over some tracks, I don't know whether they were 1, 2, 3 and 4.

Q. You crossed over some tracks to get to track No. 4?

A. Yes, sir.

Q. So that there are then and were at the time, railroad tracks between the main track and No. 4 track?

A. Yes, sir.

Q. This plat, Ex. 3, purports to be drawn to the scale of one inch to 50 feet. I scale roughly, Mr. Skaggs, with the ruler from the north end of the passenger depot to this white vertical line farthest to the left of the plat, 24 inches, roughly——

Mr. BARTON: Well, now, I don't think that is quite fair. Your map is not in any way identified, the witness says he couldn't say anything about it; the map is not in evidence and not identified, why measure it then, is that fair?

Mr. BRACELEN: If you will wait until I get the question, then if you wish to object to it, Mr. Barton, the Court will rule.

Q. —I scale roughly 24 inches; assuming that this plat is drawn to the scale indicated—and I will state that that will be shown—the distance from the passenger depot up to the switch is approximately 1,200 feet. Is it your recollection from such knowledge as you have of conditions at Amboy at the time, that that is about the distance from the depot up to the switch?

A. I couldn't say. It was night when I were there.

42 Q. It was night, yes, I understand that; that is, it was night when you were there at the time of the accident, and it was day time when you were there on the first half of the round trip; is that right?

A. First half on the round trip?

Q. Yes.

A. It was night when I was coming in on that trip.

Q. How is that?

A. It was night when I came from Clinton and I was hurt at 2 o'clock in the morning.

Q. I understand, but I say you had made the trip to Clinton from Freeport first?

A. Yes, sir.

Q. And you had passed through Amboy as I understood your testimony—if I am wrong about that, correct me—in the day time?

A. Yes, sir.

Q. Going to Clinton?

A. Going to Clinton.

Q. Yes. Now, from all the knowledge that you have, is it your recollection that it is about 1,200 feet from the passenger station up to the switch?

A. I couldn't say.

Q. Have you any idea which you can give to the jury about that distance?

A. I have no idea.

Q. No idea at all?

A. No, sir.

Q. You worked for the defendant company about four years all told?

43 A. Yes, sir.

Q. Starting first as a builder of bridges?

A. Yes, sir.

Mr. BARTON: Well, bridge man; he didn't say builder—driving piles, he said, and putting in rails and ties.

Q. Counsel says a bridge man instead of a builder of bridges. You assisted in building bridges?

A. I helped do the work.

Q. Helped do the work?

A. Yes, sir.

Q. I understand, I didn't intend to convey a wrong impression. Driving piles?

A. Yes, sir.

Q. And laying rails?

A. Yes, sir.

Q. And general bridge work?
A. Yes, sir.
Q. Were you laying steel also?
A. You mean upon the right of way?
Q. No, I didn't have reference to track steel, but bridge steel.
A. Yes; yes, sir.
Q. Well, were you just an all around bridge man, or were you an iron erecter in connection with the bridge building?
A. Well, I worked at all parts of it.
Q. All parts of it, for about two years?
A. Yes, sir.
Q. Then you began firing?
A. Yes, sir.

44 Q. Now, where were your headquarters when you were operating as a fireman?
A. Paducah, Kentucky.
Q. All the time you were firing?
A. Well, most of the time.
Q. Now, was your firing done mostly in regular runs on the road, or was it in the switch yards at Paducah?
A. No, sir.
Q. What is the fact as to that?
A. You mean did I work in the yards at Paducah?
Q. Yes.
A. No, sir, I worked on the road.
Q. On the road?
A. Yes, sir.
Q. Freight run or passenger run?
A. Freight run.
Q. And what was your run?
A. Well, extra.
The COURT: How?
WITNESS: I run extra.
Q. For the whole period of two years you were constantly employed as fireman?
A. Yes, sir.
Q. And how long before you started to work as brakeman had you ceased your work as fireman? Did you go from one job to the other immediately, or was there some——
A. No, sir, it probably was about seven weeks.
Q. Where were you during those seven weeks—at Paducah?

45 A. No, sir; not all the time, I was at Kinney, Illinois, part of the time, and Phillip, Mississippi.
Q. You started to work this last time for the Illinois Central on what date, if you know?
A. The last time?
Q. Yes.
A. Was on—well, I really couldn't say the date.
Q. How long before the accident?
A. Had I been in service, been in——

Q. Had you been working for the Illinois Central Railroad Company?

A. You mean how long had I been in braking, or the length of time I had been on the road?

Q. I will put it this way: after you quit firing, you then later resumed your employment with this road. Now, when was that with reference to the accident?

A. When I went to braking, or when I first went on the road?

Q. Well, when you went to braking.

A. Well, I was probably in service about ten or fifteen days before I ever went out on the road.

Q. You were braking for this defendant company ten or fifteen days before you made this run?

A. I wasn't braking, I was ready for duty any time, ready to go out.

Q. Well, I want to know—I understood you to say a while ago you were braking for ten or fifteen days. What were you doing?

A. What were I doing?

Q. Yes.

46 A. I was waiting to go out on the road, waiting to be called.

Q. Where were you?

A. Freeport, Illinois.

Q. At Freeport for ten or fifteen days; you were there in the pay of the defendant company, waiting to be assigned to duty, is that it?

A. How was that?

Question read.

A. Well, I wasn't drawing nothing for laying there; that was on my own time.

Q. Were you doing any work, Mr. Skaggs?

A. No, sir, none at all.

Q. None at all?

A. No, sir.

Q. So that after you quit firing which was some six or seven weeks before the accident, you did no work for the railroad company until you started out on this run from Freeport to Clinton?

A. Oh, no; I worked in bridge service during that time, that six or seven weeks.

Q. Did you start immediately to braking on this run from Freeport to Clinton?

A. No, sir, not immediately, I didn't.

Q. What were you doing just before that?

A. Just before I went out on the road?

Q. Yes.

A. I was waiting to be called for the road.

Q. I want to get it clear; somehow I don't seem to understand you yet, maybe it is my fault. Were you doing anything while you were waiting to be called?

47 A. No, sir.

Q. No bridge work?

A. No, sir.

Q. Simply waiting until you should be assigned to duty?
A. Yes, sir.
Q. Now, while you were working as fireman for two years before you ever began braking at all, did you at any time run an engine?
A. No, sir.
Q. Your work, so far as switching operations were concerned, was simply to fire the engine in various switching yards at the different stations on your regular runs?
A. Yes, sir.
Q. And of course you had, during those two years, rode an engine through the yards and up and down the yards wherever switching was necessary upon your run?
A. Yes, sir.
Q. At Paducah are there any considerable number of tracks?
A. Well, yes, there are a number.
Q. So that from the standpoint of riding the engine as a fireman, you were perfectly familiar with switching operations?
A. Where do you mean, familiar with where?

Question read.

A. No, I wasn't familiar with switching operations—a mere fireman.

48 Q. I don't mean, now, with switching operations as a switchman, but you had done lots of switching as a fireman?
A. While I was on duty firing an engine, you mean?
Q. Yes; yes, certainly.
A. Well, we had done lots of it—not so much of it.
Q. Yes. In switching operations as a fireman it would be your duty from time to time to observe as to the clearance between the engine upon which you were firing and cars standing upon tracks adjoining that upon which the engine might be running?
A. Yes, sir.
Q. So that the matter of clearance of cars and engine in switching operations was a matter that you were perfectly familiar with?
A. Well, it was owing to the yards I was in.
Q. Without reference to the yards; I am not speaking now, Mr. Skaggs, about any particular yards. I understand, and I think the jury understands clearly, that your knowledge of these yards at Amboy was limited to the testimony that you have given here, so I am not having reference to the Amboy yards. Please understand that. But generally in the matter of clearance of engine and cars, you were perfectly familiar with that matter?
A. On the Tennessee division?
Q. On the Tennessee division.
A. Well, some yards I was and some yards I wasn't.

49 Q. You pulled into Amboy at about 2 o'clock in the morning?
A. Yes, sir.
Q. The crew consisted of engineer, a fireman, two brakemen and a conductor?
A. Yes, sir.

Q. You were the head brakeman, and Buchta was the rear brakeman?

A. Yes, sir.

Q. And, in general, those designations of head and rear brakeman signify that the head brakeman shall be up at the engine, at the forward part of the train, and the rear brakeman back at the caboose or the rear part of the train?

A. When they are in motion, you mean?

Q. Yes.

A. Or when you are doing work around the yards?

Q. Well, just explain it in your own way, now.

A. Well, if we are doing work in the yard we are both supposed to be doing that work.

Q. Suppose there is work being done in the yards which would require that one brakeman be forward on the train and one brakeman rear on the train, then you would be forward and Buchta would be rear?

A. You mean for me to work around the engine, eh?

Q. No, I don't see why that question shouldn't be clear. Let us see if you can answer it without any explanation as to what I mean.

Question read.

50 A. Well, at the time we were working there I wouldn't be around the engine all the time during I was working there, I would be help doing the work setting out cars or picking up the cars, whatever was to be done.

Q. The engineer rides the right hand side of the engine?

A. Yes, sir.

Q. And you were going north, headed north that night and at the time of the accident?

A. Yes, sir.

Q. I want to go over this hurriedly. You pulled in and stopped at the station at Amboy?

A. The engine pulled by the station.

Q. Precisely. What part of the train was stopped at the station?

A. Well, the caboose wasn't very far from the station, as I remember.

Q. The engine pulled by, and the train pulled down until the caboose was fairly well down toward the station?

A. Yes, sir.

Q. You dropped off there at the station?

A. Yes, sir.

Q. And Buchta, the rear brakeman did also, and the conductor did?

A. Yes, sir.

Q. And all three of you went into the station?

A. Yes, sir.

Q. The conductor had told you back up the line that there were two cars to be set out at Amboy?

51 A. Yes, sir.

Q. Are you clear—I don't know that it makes any difference, but are you clear that the conductor said, "Two behind seven?"

A. Am I clear?
Q. Yes.
A. Yes, sir. I am clear.
Q. Clear about that?
A. Yes, sir.
Q. And it is your recollection that you did cut off nine cars?
A. My recollection, yes.
Q. And if the other men should say that as a matter of fact you cut off twelve cars instead of nine, you would be very positive they are wrong about that, would you, or not?
A. Why, certainly; certainly I would.
Q. So, according to your recollection, you cut off nine cars, and the eighth and ninth cars were the two which were to be set out at Amboy?
A. Yes, sir.
Q. You understood that those two cars were to be left off your train, weren't to be hauled by your train beyond Amboy?
A. Yes, sir.
Q. You understood that?
A. I understood that.
Q. When you went into the station at Amboy, you, the conductor, Lichtenberger, and Buchta, what was said in the station at that time, if anything, as to what you should do?
52 A. Well, I don't remember what was said in the station at that time.
Q. But, at all events, you went out, uncoupled the train between the ninth and tenth cars——
A. Yes, sir.
Q. You made that uncoupling yourself?
A. Yes, sir.
Q. You actually pulled the pin yourself?
A. I did.
Q. And gave the engineer a signal to go ahead?
A. Yes, I gave him one; I don't know, one might have been given to him before I gave one.
Q. Well, you don't know that any was, do you?
A. Well, no, I don't know that any was.
Q. And you know that you gave him a go-ahead signal?
A. Yes, sir.
Q. And he apparently started upon your signal?
A. Yes.
Q. And you pulled north beyond the switch that we have been talking about; is that right?
A. North of what switch have we been talking about?
Q. The one you have been talking about.
A. I have been talking about a whole lot of them.
Q. Well, then, you pulled north beyond the switch over which you were backing later when the accident happened?
A. You mean the switch to the main line connected with the yards?
53 Q. Is that the one you were backing over when the accident occurred?

A. Why, no, I was backing then over the main line; yes, over the main track.

Q. Well, that is the one I mean.

A. Well, that is the one, then.

Q. Now, just answer with reference to that switch, did you pull north beyond that switch?

A. Why, certainly.

Q. So that the engine would be some nine car-lengths, at least, north of the switch?

A. Yes, sir.

Q. How far did the ninth car clear the switch?

A. Yes, sir, I wouldn't have throwed it if it didn't.

Q. I see. How far did it clear it, Mr. Skaggs?

A. Oh, probably ten or twelve feet.

Q. That is, do you recall that, or is that merely your——

A. No, that is just merely what I would think it would clear.

Q. You were there and you threw the switch?

A. Yes.

Q. That is, the train pulled north on the main line with those nine cars beyond this switch, and you then threw the switch?

A. Yes, sir.

Q. Which car did you ride on that movement north to the switch?

A. I rode the seventh car from the engine.

Q. You recall, do you, that there were two more cars in the rear of where you were riding?

54 A. Why yes, I was riding the third car from the rear.

Q. And as I understand you, that was in order that when you should back in you would be there to make the cut or to uncouple the last two cars which were to be set out?

A. Yes, sir.

Q. You threw the switch and gave the back-up signal, did you?

A. Yes, sir.

Q. How far did you back those two cars down on that switch track, how far from the switch?

A. When I first set in?

Q. When the two cars were first set in?

A. Oh, I went a good ways down in the yards; I couldn't say how far.

Q. Well, how many cars of the nine passed over the switch—did the whole train or string of nine cars and the engine back over the switch?

A. Yes, sir, certainly.

Q. I see, and backed some distance over the switch.

A. Well, probably did; to go way down in the yards had to come back some distance.

Q. Did you back down as far as the station?

A. Well, I couldn't say; I don't know whether we did or not.

Q. You then cut off these two cars?

A. The two cars that I set out.

Q. You cut them off yourself, did you?

A. Well, I assisted in it; I didn't do all the cutting.
55 Q. Well, I want to know just what you did yourself?
A. Well, I don't remember whether I broke the air hose or pulled the pin, I couldn't tell you.
Q. Do you remember whether you did both of those things or not?
A. Whether I did both of them?
Q. Yes.
A. No, I don't remember whether I did both of them.
Q. You don't remember one way or the other about that?
A. No, sir.
Q. But the two cars were left down there in the yard and then the engine pulled forward with seven cars?
A. Yes, sir.
Q. Who gave the signal to go ahead?
A. I gave the signal to go ahead.
Q. And the engineer acted upon your signal?
A. Certainly, yes, sir.
Q. Which car did you ride forward at that time, after the two cars, now, have been backed into the yards and you have uncoupled them, which car did you ride, of the seven, forward again?
A. The same car I rode down in.
Q. That is, the end car of the seven?
A. Yes, sir.
Q. The last car?
A. Yes, sir.
Q. And were you at the rear end of it or the front end of it?
56 A. I was at the rear end of it.
Q. The ladder, in other words, upon the side of that car, was at the rear on the right hand side?
A. Well, I don't know whether the ladder was there or not.
Q. Didn't you ride on the ladder?
A. I rode on the box, had my foot on the box.
Q. On the box?
A. Yes, sir.
Q. And by that you mean the boxing around the wheel, the axle?
A. Yes, sir.
Q. Well, what is your recollection as to whether the ladder was there also or not?
A. Well, I was holding to the back end of the car, the rear end of the car.
Q. Yes, but I asked you if you have any recollection as to whether the ladder was there?
A. No, I have no recollection.
Q. You don't know about that. You were on the engineer's side?
A. Yes, sir.
Q. You moved forward beyond the switch carrying these seven cars, and you again dropped off at the switch?
A. Yes, sir.
Q. This, now, so there will be no confusion about it, is the same switch beyond which you had gone and over which you had backed nine cars just before?

two cars, had backed in again with the seven cars upon the main line and had come back to the station?

A. Yes, sir.

Q. And you came back to the station because somebody back there, presumably the conductor, had given a stop signal?

A. Well, some one had given, yes, a stop signal.

Q. Now, so far as you know, Mr. Skaggs, may that stop signal not have been given by Buchta stationed at the crossing, the street crossing, instead of by the conductor down at the station?

A. Given at the street crossing?

Q. Yes.

61 A. No, sir. I don't see how he could, the street crossing north of the depot.

Q. Assuming that there was a street crossing between you and the station at the time those seven cars were stopped, may not Buchta have signaled the train — *stopped* from his position as flagman at that station, instead of the engineer or the conductor doing it down at the railroad station?

A. At the crossing?

Q. Yes.

A. I don't see how he possibly could have been at the crossing and given me a stop signal.

Q. It was dark?

A. It was dark, certainly.

Q. All you saw was a lantern giving a stop signal?

A. Certainly, yes, sir.

Q. You don't know that it was the conductor?

A. Or I don't know that it was the flagman.

Q. Or you don't know that it was the flagman?

A. Buchta.

Q. Buchta?

A. Yes.

Q. You don't know one way or the other about that?

A. No.

Q. You went down, you say, and were told to take the engine and go over into the yard to pick up some cars?

A. Yes, sir.

Q. Were you told what cars?

62 A. No, he didn't know right then, he was looking them up.

Q. He was looking them up, and he was to go over into the yards and when you would come back with the engine he would be there and indicate to you what cars you were to pick up?

A. Yes, sir.

Q. That was your understanding, then, when you started back to take the engine?

A. Yes, sir.

Q. You call that taking the light engine, as I understand it, in railroad parlance?

A. Yes, sir.

Q. Where you take the engine alone without cars, you speak of using the light engine?

A. Yes, sir.

Q. So you understood that you were to go back to the engine, uncouple it from the seven cars, and go again across this switch?

A. Yes, sir.

Q. Main line switch?

A. Main line.

Q. Down into the yards?

A. Down into the yards.

Q. From the time the seven cars stopped on the main line the last time until you went back and uncoupled the light engine to go over into the yards again, you gave no signal of any kind whatever?

A. After I had stopped?

Q. Yes.

A. No.

63 Q. I want to see if I can't clear up one point here, I think it will not be confusing. When you cut off the nine cars in the first place, the first instance, now, where was that cut-off made with reference to the station, the depot?

A. Well, I don't know how far it was from there.

Q. Well, now, you came out of the depot knowing that you were to set out cars 8 and 9 and you cut off between the ninth and tenth cars; now, when you came out of the depot to do that did you make the cut-off right there in front of it or did you go up the track or down, north or south?

A. I went up the track, north, a little ways, I didn't know just how far it was, I couldn't tell.

Q. Well, you didn't go off the station platform, did you?

A. No, I don't think I did.

Q. No, so that the ninth car was there some place opposite the station or depot platform?

A. Yes, it was there somewhere.

Q. You cut off between the ninth and tenth cars and you left standing there cars Nos. 10, 11, 12, 13, 14 and the caboose?

A. I don't know how many cars we had.

Mr. BRACELEN: Well, it is now admitted in the record——

Mr. BARTON: Yes.

Q. That is all right. You don't know just how many there were?

A. No.

64 Q. But if the admission in the record here is correct, then there were five cars and the caboose left standing there?

A. Yes.

Q. Those cars weren't moved at any time after you made the original cut-off until after this accident happened, were they?

A. No, sir, not as I know of, they weren't.

Q. And the train wasn't coupled onto those cars at any time?

A. During I was working?

Q. Until after the accident?

A. Until after the accident, no, sir.

Q. Now, how far did you have to walk from the seventh car, going back, now, to where we had them?

A. Yes.

Q. How far did you have to walk from the seventh car down to the station or depot to speak to the conductor?

A. Well, I just couldn't say how far it was; I didn't look. I kind of went on a little run.

Q. A little run?

A. Yes, sir.

Q. Now, Mr. Skaggs, you understand, we know this was in the winter?

A. Yes.

Q. We know it was at night?

A. Sure.

Q. We know you weren't measuring things, I just want you, if you have any impression or judgment about the distance at all, to give the jury your best judgment.

65 A. I couldn't say.

Q. You couldn't say. You can't give the jury any light on that question of how far it was from the seventh car down to the station?

A. No, sir.

Q. At all?

A. I could not.

Q. I see, but you remember that you did go in a little trot back to the station?

A. Yes, sir.

Q. Having done that you went back to the head end of this string of cars and cut off the engine?

A. Yes.

Q. There was an engine with a cab and then a tender?

A. Yes.

Q. The usual type of railroad engine?

A. Sure; yes, sir.

Q. And you cut that off by means of a safety appliance, a lever at the side, for lifting the pin, did you?

A. Well, no——

Mr. BARTON: He didn't say that.

WITNESS: I didn't say that I cut it off.

Q. I want to ask you what is the fact about that?

A. I said no.

Q. What is the fact about that? You went back to the engine, did you?

A. Yes, I went back to the engine.

Q. And what did you do or what was done?

A. I started to cut off.

66 Q. The engine from the head car?

A. The head car.

Q. You were then on the right hand side of the train and had been at all times on the right hand side of the train?

A. Yes, sir.

Q. Then it is your testimony that Buchta was there?

A. Yes.

Q. You found Buchta there when you got there, did you?
A. Why, he was over there on the other side with his lantern.
Q. Up there at the engine?
A. Yes, when I went back.
Q. You don't know where he had been in the meantime at all?
A. He probably could have went up on the one side of the train and I on the other side.
Q. I am not asking you to speculate, I am asking you do you know where he had been in the meantime at all?
A. No, I don't know.
Q. No. The engine was cut off?
A. Yes, sir, it was cut off.
Q. And pulled up ahead of this same main line switch?
A. Yes, sir.
Q. Did you ride up on the engine?
A. Yes, sir.
Q. Did you throw the switch?
A. I threw the switch.

67 Q. Yes; that switch was on the engineer's side, on the right hand side?
A. Yes, sir.
Q. You threw the switch and gave the back-up signal?
A. Yes, sir.
Q. When you got up there to the engine you found Buchta there, as you testified; do I understand you that he asked you where you were going?
A. No, he asked me what I was going to do.
Q. What you were going to do, yes; you told him?
A. Yes, sir.
Q. You pulled at the pin?
A. I did.
Q. But you didn't get it, as I have in my notes here, you didn't get the pin?
A. I didn't get it, no.
Q. Well, did you finally get the pin, or did he?
A. Only on the opposite side.
Q. On the opposite side, he got it by pulling the lever?
A. I suppose so.
Q. That lever, can you describe the construction of it?
A. Well, I don't know whether I can or not.
Q. Well, it is one long, round iron extending from one side of the engine to the other, about an inch in diameter, isn't it?

Mr. BARTON: Oh, you don't understand it.
Mr. BRACELEN: I just want to see whether he does or not.

68 A. On the car?
Q. The lever, now, at the side for making your uncoupling, for cutting off the engine.
A. Cutting off the engine, well there is different kinds of them.
Q. Well, which kind was this?
A. Well, I couldn't say; I wasn't on the opposite side.

Q. Which kind was on your side?
A. Well, it was a rod about an inch and a half, I suppose, in diameter, run to the pin and the draw bar.
Q. You think it was about an inch and a half in diameter?
A. Yes, probably was; I wouldn't know.
Q. You said to him you were going to get a little slack?
A. Yes.
Q. To pull out the pin?
A. To pull out the pin.
Q. But you didn't do that?
A. No, I didn't get the slack.
Q. Your testimony is that he pulled out the pin?
A. Yes, he says, "Go ahead."
Q. What is that?
A. Told *be* to go ahead.
Q. And you gave the engineer a go-ahead signal?
A. Yes, sir.
Q. The engineer pulled up across the switch?
A. The engineer pulled up across the switch.
69 Q. Over beyond the switch?
A. When we came back down in the yards, yes.
Q. No, now, let us not get this confused at this time. After you or Buchta—as you testified, Buchta—pulled the pin, you gave the engineer a go-ahead signal to run ahead with the light engine?
A. I did.
Q. And the engineer went ahead?
A. Started ahead.
Q. Started ahead, that is what I am getting at; how far did he go?
A. He didn't go but a little ways until I stopped—gave him a stop signal, and stopped.
Q. You gave the engineer a stop signal, and he stopped the engine?
A. Yes, sir.
Q. How far, according to your best recollection now, did he go ahead before you stopped him or swung him down?
A. Oh, probably a car length.
Q. Where were you then?
A. I was on the rear of the engine.
Q. What did you do then?
A. What did I do?
Q. Yes.
A. Well, I stopped and wanted to know if the cars would clear.
Q. You swung the engine down, it stopped, you got off——
A. I did.
Q. —and wanted to know if the cars would clear?
70 A. Yes, sir.
Q. You had asked Buchta, as you testified, and you hadn't got a satisfactory answer?
A. No, sir.
Q. He said they would clear a mile?
A. Clear a mile.

Q. That head car was standing where you had left it when you went down to the station?

A. Yes; yes, sir.

Q. It was standing there on the main line in the position in which you yourself had swung the engineer down before you went down to the station to talk to the conductor?

A. The car was standing there, yes, sir.

Q. It was standing there. That is where you had left it?

A. That is where I had left it, yes.

Q. When you started ahead, pulled a car length swung the engine down, what did you do it for? That is to say, why did you swing the engine down at that time?

A. I wanted to know whether I would be in the clear or not, coming back there.

Q. Where was the rear end of the tender at that time when you swung down the engine and stopped and got off and asked Buchta if they would clear?

A. I was about a car length from the car where it was cut off.

Q. I know; where was it with reference to the switch?

A. I couldn't say how close I was to the switch for I didn't
71 know where it was until I got out, seeing the switch ahead.

Q. You had been over it twice?

A. Yes.

Q. But you don't now remember how far it was to the switch that you were then going up to turn?

A. No, I don't know how far it was.

Q. And Buchta said to you it will clear a mile?

A. Clear a mile.

Q. So you got back on the engine, went ahead, crossed the switch and swung the engine down again?

A. Crossed the switch?

Q. Yes, I mean beyond the switch on the main line.

A. No, right up to the switch.

Q. I mean after you had stopped it, after you had asked Buchta, according to your testimony, whether it will clear, and after Buchta has said, "Yes, it will clear a mile," you then gave the engineer a go-ahead signal?

A. Yes.

Q. Got on the engine and rode up past the switch?

A. Yes, sir, rode up to the switch.

Q. Just enough to clear?

A. Yes, sir.

Q. The engineer stopped just enough to clear the switch?

A. Yes, sir.

Q. You threw the switch?

A. Yes, sir.

72 Q. And gave a back-up signal?

A. Yes, sir.

Q. And swung back on the engine?

A. I did.

Q. That is, on the tender?

A. That is, on the tender.

Q. And then it was that you were looking back for the rear man, the flagman?

A. Yes.

Q. To see whether he would give any signal or not?

A. To see where he was at.

Q. And then it was that the cornering occurred catching you between the rear right hand side of the engine—of the tender—and the corner of the car?

A. Yes.

Q. That was an ordinary freight car?

A. Yes, sir.

Redirect examination.

By Mr. BARTON:

Q. Mr. Skaggs, do you know whether your fireman was on the engine in this last movement of the light engine?

A. No, he wasn't.

Q. Where was he?

A. He got off to go to the restaurant to get him something to eat, get a lunch.

Q. At what point in the work there at Amboy that night did he leave his engine?

A. Well, he left as we was pulling in, he left as we was going by Amboy.

73 Q. So he wasn't there while you had done any of this work that was being done there at Amboy?

A. No, no, sir.

Q. And your conductor, as I understand your testimony, went into the station at the time your train first came to a stop then?

A. Yes, he went right on into the station.

Q. And did you see him any place else than in the station after that up until after you got hurt?

A. No, not until I got hurt, I didn't.

Q. So far as you know, he wasn't out of the station at all at any time during the work that you were doing prior to your accident?

A. No, sir.

Q. So that there were just three of you doing that work which you have testified about there in the yard at Amboy, and that was your engineer——

A. Yes.

Q. —and the rear brakeman and yourself?

A. Yes, sir.

Q. Had you noticed, either that night or before that night any road or street crossing over the railroad tracks there at that station at Amboy or about there?

A. No, I hadn't noticed at all.

Q. Counsel has made reference to your remark at one time speaking of the flagman, and I think at one time you spoke of your doing flaggings yourself, or something or other——

Mr. BRACELEN: No, I didn't understand that he did.

74 Q. Well, what employe on freight trains is sometimes referred to as a flagman?
A. Well, as a flagman?
Q. Yes.
A. Well, the rear man, I always call him the flagman.
Q. Is there any special work that he does that is the foundation for your calling him a flagman?
A. Well, he protects and flags the rear end.
Q. Flags the rear end of your train?
A. Yes.
Q. If your train comes to a stop on the main line what is done with reference to protecting it?
A. Why, he goes back to flag.
Q. The rear man then would go back to flag?
A. Yes, sir.
Q. And how does he do that?
A. Why, he takes his flag or lantern and——
Q. And goes back along the track?
A. Yes, sir.
Q. The rule book makes some special provision to cover that, doesn't it?
A. Yes, sir.
Q. As to how far he shall go and what he shall do?
A. Yes, sir.
Q. And the rear brakeman on the freight train is the man who does that?
A. Yes, sir.
Q. Now, is that the reason that you referred to him as a flagman?
75 A. Yes, that is the reason I referred to him as a flagman.

Recross-examination.

By Mr. BRACELEN:

Q. Mr. Skaggs, when you left Amboy, left the hospital, you went to Freeport?
A. Yes, sir.
Q. You went there to the home of your brother?
A. Yes, sir.
Q. Your run had been from Freeport to Clinton?
A. Yes, it went from Freeport to Clinton.
Q. Before the accident you had been living at Freeport?
A. Yes, sir, been at Freeport.
Q. That is where you were living at the time?
A. Yes, sir.
Q. You have remained there in Freeport until you came here for the trial of the case?
A. No, I went home.
Q. Paducah?
A. Yes, sir.
Q. The rule book, you understand, also provides for the flagging

of a street crossing at night in a city at which there may be or are gates and a flagman to operate the gates during the day time?

A. I don't know whether they were there or not.

Q. No, but I say your rule book provides for and requires the train crew to flag such crossings under those circumstances, doesn't it?

A. To stay there and flag the crossing?

76 Q. Yes, flag it just as you flag the train, as you have testified, and that is the necessity for the flagman going back; isn't that true?

A. No, sir, I don't think it is.

Q. You had a rule book yourself, didn't you?

A. No, sir, I didn't.

Q. During the two years that you worked as fireman, didn't you become familiar with that practice and rule of the company?

A. Well, they always have a flagman for those crossings, to stay there.

Q. In the day time?

A. In the day time, and some at night.

Q. When there isn't a flagman so stationed at night, then it is the duty of the rear brakeman to flag such crossing?

A. Well, he has to see that the crossing is cut, I suppose or either one of them see that crossing is cut so people can pass by.

Q. So far as it requires a protection, it is his business to take care of it?

A. It is just as much my business to take care of it as it is his.

Q. Just as much as it is the rear brakeman's?

A. Yes.

Q. Your idea is, then, that there is no distinction between a rear brakeman and front brakeman upon that point?

A. Upon that point.

Q. And that it would be just as much Buchta's business to be up here at the front end of the train at the time these move-

77 ments just before the accident were made, as it would be yours?

A. More so.

Q. More so. That is all.

Adjourned until 11 o'clock A. M. May 13, 1913.

Mr. BARTON: I desire to offer in evidence the expectancy of life under the American Experience Expectation of Life as prepared by the Life Insurance Companies, appearing in the Annual Edition, showing that at the age of twenty-two (I take it, that is what we have to deal with, the plaintiff, as twenty-two; he said he will be twenty-three this coming June) is 40.85 years. I offer that in evidence. With that plaintiff rests.

Case opened on behalf of defendant by Mr. Bracelen.

C. G. BRYAN, sworn on behalf of defendant, testified:

By Mr. BRACELEN:

Q. Your name is C. G. Bryan?
A. Yes, sir.
Q. You live where, Mr. Bryan?
A. Freeport, Illinois.
Q. What is your employment?
A. I am assistant engineer on the Illinois Central Railroad Company.
Q. With your headquarters in Freeport?
A. Yes, sir.

78 Q. How long have you been in the engineering department of the Illinois Central railroad?
A. A little over eight years.

Q. And for how long have you held your present position?
A. About 20 months.
Q. In reference to tracks and yards, station grounds, at Amboy, Illinois, you have recently made some measurements?
A. Yes, sir, I have.
Q. Calling your attention to plat marked Def't's Ex. 3, identify it if you can?
A. Yes, that is a plat that I made.
Q. And what does it show in a general way, Mr. Bryan?
A. It shows the yards from the north end of the yard, or from the point something over 200 feet from the north end of the yard to a point south of the depot at Amboy, on the scale of 50 feet to the inch.
Q. Now, from what data was this made, measurements taken?
A. Measurements taken on the ground.
Q. By you?
A. Yes, sir.
Q. When?
A. It was either Thursday or Friday of last week.
Q. Now, with reference to the track locations and the data generally shown on the plat, for how long a time have you been familiar with the general situation there—or, put it differently, have you

79 been familiar with it since as long ago as January 13th of this year, when the accident occurred?
A. Yes, sir.

Q. What are you able to state as to whether or not conditions shown here on the plat are the same or different from conditions as they were last January?
A. The conditions are the same as they were then, there have been no changes.
Q. Now, I wish you would point out on the plat, Mr. Bryan, the location of the passenger depot?
A. It is here. (Indicating.)
Q. Now, directly in front of the depot appear to be a number of tracks; will you indicate to the jury what those tracks are, in order?
A. The first one is the main, the next the passing track, then

next in order are eight tracks, eight yard tracks, numbered 1 to 8 consecutively.

Q. And you have marked on the plat, in pen, the names of those tracks?

A. Yes, sir.

Q. Now will you indicate to the jury where the most northerly or main line switch is shown on this plat?

A. It is right here, near the C., B. & Q. crossing.

Q. Near the C., B. & Q. railroad crossing?

A. Yes, sir.

Q. You have marked that in pen, "main track switch?"

A. Main track switch.

Q. There appears to be here, crossing the tracks, Division street; what is that?

80 A. Well, that is a street crossing, a street of the city of Amboy, crossing the tracks there.

Q. And there appear to be various switches indicated on the plat; will you explain just what they are. You have indicated already the main track switch back here; coming on now to the south?

A. Well, the next one on the right as you go south is the wye switch, or the switch of the connecting track of the C. B. & Q. and then the next is a passing track switch where the yard leaves the passing track and the next seven the switches of the yard tracks.

Q. Now, what is the relation, so it will be perfectly clear, of these switches, numbers 1, 2, 3, etc., to tracks numbers 1, 2——

A. They govern the tracks of the same number.

Q. So that here switch No. 1 governs track No. 1?

A. Yes, sir.

Q. Of the yards, and so on down, is that correct?

A. Yes, sir, and No. 7 governs tracks 7 and 8.

Q. Precisely.

A. Only one switch for the two tracks.

Q. One switch there for the two tracks, 7 and 8. At the Division street crossing were there during the month of January any gates?

A. Yes, sir, there were.

Q. Just in very brief description explain how those gates were constructed and operate?

81 A. The gates are on each side of the outside of all the tracks and are operated from a tower right north of Division street and east of the main track.

Q. Is that tower shown on this plat?

A. As I have indicated the approximate location of it in ink here. It wasn't shown on the original plat.

Q. Yes, a little square, in black ink, marked "Flagman's . use?"

A. Yes, sir.

Q. We have been speaking of these tracks here as running north and south; is that strictly accurate?

A. Well, not strictly; they run——

Q. Well, now, I don't care to have you explain to what extent it isn't accurate, because I think it is going to be clearer to both sides and the jury if we don't explain it. Assuming that the tracks do

POOR COPY

run north and south, which is the north side of this track and which the south side?

A. The left is the north.

Q. Facing as the jury faces the plat, the north is to the left?

A. Yes, sir.

Q. And the south is to the right?

A. Yes, sir.

Q. And the stations of Clinton and Freeport are each way from Amboy?

A. To the left is towards Freeport and to the right toward Clinton.

Q. Oh, I see you have that indicated, haven't you?

82 A. Yes, sir, it is indicated on the plat here.

Q. Here the arrow to the left of the plat, to Freeport, and the arrow to the right of the plat, to Clinton, I see. Now, did you make some measurements with reference to the distances here? I mean did you make some—take some figures?

A. Yes, sir.

Q. Now, I think I will have certain distances pointed out. I don't know just which ones we will want. Is this correctly drawn to scale or not?

A. It is correctly drawn to scale.

Q. So we could get at distances by scaling?

A. Yes, sir.

Q. But if you have the distances——

A. I have the distances.

Q. I wish you would tell us first, if you can, if you have already noted it, what the distance is from the passenger station up to the main line switch, so that we will get an idea of the length of the yards.

A. It is 1,242 feet from the main line switch to the north end of the passenger depot.

Q. What is the distance, if you have it, from Division street to the depot?

A. That is 570 feet.

Q. Now, what is that distance you are giving me?

A. That is from Division street to the north end of the depot.

Q. From what point on Division street?

A. Wait, now, we better get that a little closer, I guess. That is 575 feet from the center of the street on the main track.

83 Q. On the main track from the center of Division street of the main track to the north end of the depot is 575 feet?

A. Yes, sir.

Q. Now, from the same point on Division street, if you can, or from Division street to the main line switch or the most northerly switch of the yards, what is the distance?

A. 667 feet.

Q. From what point on Division street is that measurement?

A. That is the center of the street.

Q. From the center to the main line switch?

A. Yes, sir.

POOR COPY

Q. Are you able to give us the width of Division street as shown by the lines?

A. You mean the width square across the street, or along the track?

Q. Well, whichever way you have it?

A. Well, it is 60 feet wide, the street is.

Q. And since it doesn't cross at right angles it would be slightly more than that?

A. Yes, sir.

Q. On the track measurement. You spoke of the "Q" tracks. It hasn't been referred to, I think in this case, thus far. What are those "Q" tracks?

A. They are the main track crossing our—the Illinois Central main track just north of the main track switch.

Q. In other words, there is a crossing there of the Chicago, Burlington & Quincy railroad and the Illinois Central railroad?

84 A. Yes, sir.

Q. And that is shown at the north end or the left side of this track?

A. Yes, sir.

Q. Is that marked?

A. Yes, sir.

Q. Oh, yes it is marked "C. B. & Q. Railway," so that will be clear. I want to ask you what this little white rectangle is to which I am pointing?

A. That is a pipe under the main track, which is under the main and passing track?

Q. A pipe, a sort of a culvert?

A. Yes, sir.

Q. I think I will ask you, Mr. Bryan, to mark that "Culvert" now, so that we will——

A. I got to put the bridge number on there; I think I have got it right here. (Looking at memoranda.)

Q. Well, that isn't necessary; if you will just put an arrow there and mark it "Culvert." Five-foot pipe, you say?

A. That is the way I have it on the other, I think.

Q. Five-foot pipe, all right. That is, I suppose a drain pipe under the tracks?

A. Yes, sir.

Q. What is the character of the surface of the roadbed there at that point?

A. Well, it is on a slight fill about four or five feet, but it is level on top.

Q. Level on top?

A. Yes, sir.

85 Q. And tight on top?

A. Yes, sir, no opening.

Q. No open trestle work or anything of that nature?

A. No, sir.

Q. Is that correct?

A. That is correct.

Q. I want to be sure that is clear there. Now, that plat doesn't show the track centers, does it?

A. No, sir; I didn't indicate them on there.

Q. You have shown those on another plat that you made?

A. Yes, sir, I did.

Mr. BRACELEN: The defendant offers in evidence the plat, Ex. 3.

Mr. BARTON: No objection.

Q. Calling your attention to plat Ex. 4; what is that?

A. That is a plat showing the north end of the yard, on a scale of 20 feet to the inch.

Q. That is, that same yard at Amboy?

A. Yes, sir.

Q. And as to directions, are they the same upon this plat as upon the plat Ex. 3?

A. They are.

Q. The parallel lines crossing the tracks diagonally to the right of this plat showed Division street, I take it?

A. Yes, sir.

Q. You haven't marked it here?

A. It isn't indicated.

Q. But this is Division street?

86 A. That is Division street.

Q. Shown upon the other plat. And where upon this plat is the main line switch?

A. It is near the left end of the plat or north end, right here.

Q. I think I will ask you to mark it, because this plat will be offered in evidence and we ought to——

(Witness marks.)

Q. You have marked it "Main track switch?"

A. Yes, sir.

Q. And you have indicated here the C. B. & Q. railway crossing just beyond the main track switch?

A. Yes, sir.

Q. And the rectangle to which I point now is the culvert or five-foot pipe that you referred to in the other plat?

A. Yes, sir; it is indicated on here by "Five-foot gas iron pipe."

Q. Now, there are certain figures upon this plat which I wish you would explain. Just tell the jury and the Court what these figures indicate?

A. These figures are located between the main and passing tracks, beginning at the frog of the passing track and running south. The figures show the distance between the centers of the tracks for every ten feet, beginning at ten feet from the point of the frog and twenty feet from the point of the frog, etc.

Q. Now, just a moment. The distances between the centers of the tracks are shown by those figures?

87 A. Yes, sir.

Q. Now, what tracks do you refer to?

A. That is between the center of the main track and the center of the passing track.

Q. Now then, will you state what those distances are, although they are shown there, state them so that we will get them clear.

A. Well, at the point of frog the distance is a gauge of four feet and eight and a half inches, and at ten feet from that it is five feet, forty-five hundredths.

Q. Now, you haven't indicated here, then, at point of frog?

A. No, sir, that isn't on there.

Q. You say that is gauged; what do you mean by that?

A. That is the gauge of the track, the standard.

Q. So that at the point of frog you would have to scale the track gauge as to the distance between track centers?

A. Yes.

Q. The first figures you have indicated here, then, 5.45 feet, is ten feet south of the gauge?

A. South of the frog.

Q. Of the frog, exactly. I want to be sure that this whole thing is clear—I suppose everybody knows that, but let us have you state it for the record.

A. That is the point at which the rail of what is generally known as a switch or turn-out track crosses the rail of the main track.

88 Q. Now, proceed with those other measurements shown there.

A. At 20 feet south of the frog the distance is 6.2 feet; at 30 it is 6.8 feet; at 40 it is 7.45 feet; at 50 it is 8.15 feet; at 60 it is 8.85 feet; at 70 it is 9.4 feet; at 80 it is 10 feet; at 90 it is 10.05 feet; at 100 it is 11 feet; at 110 it is11.4 feet; at 120 it is 11.8 feet; at 130 it is 12.2 feet; at 140 it is 12.4 feet; at 150 it is 12.6 feet; at 160 it is 12.8 feet; at 170 it is 12.9 feet; at 180 it is 12.9 feet; at 190 it is 13 feet.

Q. Now, I think you have given the numbers progressively from left to right as they appear here?

A. Yes, sir.

Q. And the distance between those numbers is ten feet lengthwise of the track?

A. Yes, sir.

Q. And all of those measurements that you have given are the distances of track centers?

A. Yes, sir.

Q. That is, from the center of the main line track to the center of the passing track?

A. Yes, sir.

Q. For some eighteen years, I believe you have said, at least, you have been in the engineering——

A. Eight years, not eighteen.

Q. Eight years in the engineering department of the Illinois Central railway?

A. Yes, sir.

89 Q. And in that department and in such positions as you have occupied, what, if any, duties have you had with reference to laying out the railroad yards and determining the distances between tracks, etc.?

A. Well, it has been part of my duties to lay out tracks, yards, etc.

Q. Now, from your experience and knowledge of the railroad business, state whether or not the convergence of these two tracks, passing track and main line track, as you have just stated it, giving in detail is according to good railroad practice and standard railroad engineering?

A. Yes, sir.

Q. There is one thing more I have forgotten: At the bottom of this exhibit marked Ex. 4, there appears another series of lines and figures.

A. Yes, sir.

Q. Now, that is a plat to show what with reference to tracks?

A. Shows the grade of the main track and passing track.

Q. The grade of the main track and passing track. I will have to ask you if you will explain that also. Now, first of all, I think—I want you to have less trouble in making this clear to the jury than you had in making it clear to me. First of all, let me ask you what is the relation, as the lines would be projected one upon the other, of these two drawings?

A. Well, the points on the profile here or grade of the track are directly under the corresponding point on the track.

Q. So that if you draw a right line from the upper plat
90 or drawing here to the lower, you would strike the identical location in the yards there at Amboy; is that correct?

A. Yes, sir.

Q. Very well. Now then, you have indicated here only one line for the main track; in other words, it is the level of the tracks, as I understand it?

A. Yes, sir.

Q. And you have indicated the passing track by the dotted line?

A. By a dotted line.

Q. Now, what are the measurements at the top of this lower drawing?

A. The measurements at the top, opposite each of these vertical lines, gives the elevation of the track at that point of the main track at that point.

Q. And the measurements at the bottom?

A. They give the elevations of the passing track at that point.

Q. What are these vertical lines which I see are numbered 1, 2, 3, 4, 5 and 6 clear across this lower drawing?

A. They represent what we call stations or points in the survey, hundred feet apart.

Q. A hundred feet apart. Now, will you state the grade of the main line track as the main line approaches the main track switch at Amboy. Just whatever your figures show there, then explain it, so we can get it from the plat as well.

A. Well, the closest point I have to the switch is just south of the switch, 99.85, elevation of 99.85; and fifty feet south of that
91 point, at station 3, we have an elevation of 99.70, which makes a difference of fifteen-hundredths of—at any rate, it

is fifteen-hundredths of a foot in fifty feet of an upgrade coming north.

A. I see. Let me get that again. How close is your first elevation to the switch?

A. Well, that is twenty-two feet south of the switch.

Q. The first elevation or grade that you have taken is twenty-two feet south of this main line switch?

A. Well, no, the one I gave you there was, but the first one I have is something over 200 feet north.

Q. Oh, yes, something over 200 feet north. Now, we are not concerned, I think, with these absolute figures 99.85 and 99.70, but as I understand you, the difference between those two figures will indicate to the jury the fraction of a foot, in decimal fraction, of ascent in the grade of the track toward the switch; is that correct?

A. Yes, sir, it is.

Q. And so these figures shown here at the upper side of this bottom elevation, drawing, will give to the jury the main line track elevation; is that correct?

A. Yes, sir.

Q. And the process of getting it is to subtract the one figure from the other, which will give the decimal fraction of a foot?

A. Yes, sir, for the distance between the two points on the plat.

92 Q. For the distance between the two points on the plat, which is 100 feet between the vertical lines?

A. Yes, sir.

Q. Is that correct?

A. Well, it is 100 feet between these heavy vertical lines, but there is a light vertical line between, and that is fifty feet.

Q. Oh, yes, and you have indicated the fifty-foot measurement also?

A. Yes, sir.

Q. Now, what does the line itself, this white line marked "main track," what does that indicate as we look at it?

A. Well, that indicates the profile of the top of the rail.

Q. In other words, it shows the direction of ascent and descent?

A. Yes, sir.

Q. Of the track; is that correct?

A. Yes, sir.

Q. So that if we want to determine whether this track is on a level or is going down hill or is going up hill, we would just look at this white line marked "main track" to get it?

A. Yes, sir.

Q. Coming back here from this point, we will say, which is No. 5 of these vertical lines, what is the general slope of that track proceeding toward the main line switch? I don't mean in figures,—is it up or down?

A. It is up.

93 Q. I think now we have got the plat so that with what explanation you have given, the jury will understand it. I know it was hard for me to get.

Recess until 2 P. M.

Q. Mr. Bryan, so that the exact relation between Def't's Ex. 4 and Def't's Ex. 3 may be made perfectly clear, I am going to ask you to mark on the upper part here, the upper drawing, or Def't's Ex. 4, the wye switch which was shown on Ex. 3. Just mark that with a "Y," if you will.

(Witness marks plat.)

Q. And also the—let's see what you call that switch right by the wye switch on this plat—"passing," just the word "passing;" indicate that switch.

(Witness indicates.)

The witness was asked to indicate No. 1, No. 2, No. 3 and No. 4, and did so indicate on the plat.

Def't's Ex. 4 introduced in evidence without objection.

Cross-examination.

By Mr. BARTON:

Q. You have testified that this yard at Amboy as disclosed by your drawings is uniform with reference to the other yards that you have had anything to do with?

A. Yes, sir, it is.

Q. By that, I suppose you mean that the tracks are a similar distance apart?

A. Yes, sir.

94 Q. Do you mean anything else than that?

A. Well, no, only that the tracks are arranged as they are arranged in other yards that I have had experience with.

Q. In what respect?

A. Well, the switches are located similarly, and——

Q. Now, just on that point: What is there about the switches that makes them similar to other yards?

A. Well, the distance, for instance, of switches to the frogs, from a switch to a frog, and the distances from switches to the clearance point and features of that kind.

Q. Now, do you mean to say that the frogs shown on this Ex. 3, being the first one of the two maps that you have identified, are all of the same distance from the switch?

A. No, not all the frogs on the plat are the same distance from the switch.

Q. Well, then, there can't be very much to that proposition, that the frogs are the same distance from the switches, because in the Amboy yards they are not the same distance. If they vary in the Amboy yard how can they correspond with the yard——

A. What I mean is that the distances for this particular yard are the same as they are in other yards for the same kind of frogs.

Q. Do you mean by that that the frogs vary in all yards with reference to the distance from the switch?

95 A. Yes, sir.

Q. Do you know what the distance is from the switch, as

a uniform proposition, now, in the yards you refer to between the frog on a main line and the switch?

A. Well, it depends on the number of the frogs.

Q. And why?

A. Well, the distance is governed by the curvature in the turnout track; and where the curvature is slight the distance is greater from the switch to the frog.

Q. Then, as I understand you, now, the distance from the frog to the switch is determined by the curvature of the track?

A. Yes, sir.

Q. Is there any uniformity in the question of curvature of tracks?

A. No.

Q. Well, then, it would necessarily follow that there couldn't be any uniformity of distances between switch and frog?

A. No, there is no uniformity for that distance.

Q. The distance between center and center of tracks where they become parallel with each other in this Amboy yard is what?

A. Thirteen feet.

Q. And from that thirteen feet, why, they run down to the switch?

A. Yes, sir.

96 Q. Now, is that a uniform distance, thirteen feet between center and center of tracks in railroad yards generally?

A. Well, no, there are some of them closer.

Q. What is there that governs the question of the nearness of tracks?

A. Well, I couldn't say, as a rule.

Q. Well, you don't put them up close together for what reason?

A. Well, how close together do you mean?

Q. What is the distance from one rail to the other rail?

A. Of one track?

Q. Yes.

A. Four feet, eight and a half inches.

Q. Is that from the center of the ball of the rail or the inside or outside?

A. The inside.

Q. The inside is four feet eight and a half inches?

A. Yes, sir.

Q. The outside would be how much?

A. Well, it would depend on the size of the rail.

Q. A ball of the rail is about how wide, ordinarily?

A. Two inches to two inches and a half.

Q. So you would have to add from four to five inches to that four feet eight inches which is the measurement of the inside of the rails, to the outside ball of the rails?

A. Yes, sir.

97 Q. Now, you can't put another track right up close alongside of one track?

A. No.

Q. And why?

A. Well, because there wouldn't be clearance for the cars.

Q. And isn't that the reason, and the whole reason or foundation

for the measurement of distance between centers and centers, the question of clearance?

A. Yes.

Q. And by clearance you mean so that the cars and engines being operated upon the two tracks that join each other will clear each other, pass each other, without hitting?

A. Yes, sir.

Q. And you not only take that, but then you add to the measurement of the cars a certain measurement figuring that it will clear a man on the side of the cars?

A. Yes, sir.

Q. Now, isn't that the whole story, then, with reference to locating tracks, to get a sufficient clearance so that cars will pass free, with room between the cars to clear men in the performance of their duties on the side of the cars; that is right, isn't it?

A. Yes, sir, it is.

Q. Now, do you know the width of cars?

A. Well, there is no uniform width.

Q. Well, you say you have located yards and you have now given us the things that control the space between the tracks; you
98 must have some knowledge of the width of cars?

A. Yes, I know about the width; they run from eight and nine feet.

Q. Eight and nine feet; you mean wide?

A. Yes, sir.

Q. Are those, now, the extremes that you have given us, or, in other words, the maximum and minimum?

A. No, there are cars wider than that.

Q. Are there any that are less than eight feet?

A. Well, I have never measured one.

Q. Well now, how much more than nine feet are there cars in width?

A. Nine and a half is the widest I have——

Q. Nine and a half. So, taking the width of the track from the outside of the rails to the outside of the rails as being four feet eight inches, plus two inches for each rail, gives six, would be five feet two inches there; nine feet and a half—you will get four feet four inches of the car extending out over the track, which, divided by two to find the amount on each side, would give us four and a half plus two, will be two feet eight inches that the car—am I going wrong?—yes, four feet four inches and half of that—two feet two inches that the car would extend out over the track on each side; that is right, ain't it?

A. Yes, sir.

Q. That is, I am assuming now, that my mathematics is good. Now, take a track that is thirteen feet,—tracks that are
99 thirteen feet from center to center, and take from that the width of a car of nine feet and a half, and you have left three feet and a half of a clearance?

A. Yes, sir. Four feet——

Q. And that is about what you figure for?

A. I guess you are right now, three feet and a half.

Q. Yes, and that is why you make it thirteen feet from center to center?

A. Yes, sir.

Q. So as to get about that amount of clearance between any two cars; that is right, isn't it?

A. Yes, sir.

Q. Now, will you tell us the distance between the—I guess I will have to bother you to step down here. Will you tell us the distance between the main line switch and the first point between the main line track and the passing track where the distance becomes thirteen feet from center to center?

A. (After looking at memorandum.) That is 308 feet.

Q. Now, you understood my question? I am speaking of the main line switch at the north end of these yards, and I am speaking of a distance running southward from that main line switch?

A. Yes, sir.

Q. I might say that I am asking this so as to make the record clear rather than because I had any doubt about what you meant. Now, what is the distance—I think you gave this, but I want
100 it again—from the main line switch at the north end of this yard, going south, to the frog between the main line and the passing track?

A. (After looking at memorandum.) 118 feet.

Q. Speaking of a frog, the frog is the point where the inside rails of the two tracks cross each other?

A. Yes, sir.

Q. Now, is the divergence from the frogs south between the main line track and the passing track regular or irregular?

A. Well, it is regular.

Q. That is, both tracks are straight and diverge in straight lines to the distance that you have given us of 308 feet from the main line switch at the north, at which 308 feet they become parallel?

A. No, sir, they are not straight; the main track is on a curve.

Q. Is the passing track on a curve also?

A. No, sir, it is straight.

Q. Then they couldn't diverge regularly; that is, at the same angle at all points?

A. No, not the same angle, but——

Q. The main line is something on a curve, so that the first part of the angle made between the two tracks from the frog, going south, would be sharper than it is after you get a distance of a hundred feet or so away from the frog?

A. Yes, sir.

Q. Now, how far from the frog southward must you go to reach the point where the measurement between the center of the passing track and the center of the main line track would be ten feet?

101 A. Eighty feet.

Q. And then adding that to the distance between the main line switch and the frog you get how much?

A. 198.

Q. From the main line switch down to the point where the tracks are ten feet apart?

A. Yes, sir.

Q. Now, how far is it from the main line switch at the north end of this yard down to the place where the tracks become nine feet apart from center to center?

A. From the frog, did you say?

Q. No, from the main line switch, please?

A. All right. 182 feet.

Q. I think you may take your seat, Mr. Bryan. (Witness resumes seat.) As this yard is made up there is just one main line switch at the north end of the yard and that connects one track on the west side of the main line?

A. Yes, sir.

Q. There is, however, another main line switch, is there not, at the north end of this yard?

A. Yes, sir, there is.

Q. And that other main line switch is farther south than the one that we have been talking about?

A. Yes, sir.

Q. And connects with what is marked as the house track here, which is on the east side of the main line track?

A. Yes, sir.

102 Q. Now, this most northerly main line switch on the main line track which so connects with a track on the east side of the main line connects the track that is marked as passing track immediately on the west side?

A. Yes, sir.

Q. But the fact is that that track which is so connected with the main line track serves the purpose of a lead for other yard tracks?

A. Yes, sir.

Q. And that there are eight such other tracks?

A. Yes, sir.

Q. Perhaps that is a little bit inaccurate also. The eighth is really the extension of the lead; isn't that right?

A. Why, yes; yes, but——

Q. So that there would be just seven independent switching tracks extending off from the lead or passing track; that is, I mean in addition to what is marked the passing track?

A. Yes, sir.

Q. I take it that you had nothing to do with the laying out of this yard yourself?

A. No, sir.

Q. As to this street that is marked on Def'ts Ex. 3 as Division street, is that the only street crossing that intersects these yard tracks at Amboy?

A. Yes, sir.

Q. I suppose Amboy is a town of practically one street; is that it? That is, one main street, all the business on that one street?

103 A. Well, no, there are several streets there; it is a good-sized little town.

Q. Well, do you know what the most important street in the town is?

A. Well, I don't know the name of the street, but——

Q. Do you know whether it is Division street?

A. I don't think Division street is. I am not very familiar with the town.

Q. Do you know which side of these tracks the town is chiefly located?

A. It is on the east side.

Q. Is there any portion of the town on the west side of the tracks?

A. Well, yes, there is some of it over there; I don't know how much; never was over west of our yard there at all.

Q. Are there any factories or warehouses in along these tracks forming the yards there at Amboy?

A. No, no, sir.

Q. In the vicinity of where Division street is marked to be?

A. Not close to the yards; there are this side of the track; they are shown at the extreme west track there, the elevator track; I don't know whether it is marked on there or not.

Q. That is the most westerly of the tracks marked on this Ex. 3, you see, it is marked here "elevator track?"

104 A. Well, there are elevators and warehouses west of that, but none between it and the yard proper.

Q. Is this street marked Division street put to any special use?

A. Well, it is a street crossing used in passing from the east to the west side of town.

Q. But the west part of it you say you don't know anything about?

A. No, sir.

Q. This country west here, whether it goes to a town or whether it goes to the country?

A. Well, it is part of the town over there.

Q. The statement has been made here, I think it was a statement of counsel, although maybe you made it yourself, that this is a town of some 1,800 population, something of that kind?

A. I understand that is the population of it.

Q. There is but one passenger depot there?

A. That is, one Illinois Central depot; the C. B. & Q. has another depot in town.

Q. And is there a freight house independent of the passenger depot?

A. Yes, sir, it lies in north of Division street.

Q. On which side of the tracks—east or west?

A. On the east side.

Q. Would it be south of the C. B. & Q. track?

A. Yes, sir.

105 Redirect examination.

By Mr. BRACELEN:

Q. Counsel has referred to a second main line switch—he has called it a main line switch, and I note that you concur in that—leading from the main line to the house track, you stated?

A. Yes, sir.

Q. I wish now, you would indicate on Def't's Ex. 4 with your pencil which switch that is so that we will have it identified.

A. Will I call it the house track switch?

Q. Call it the house track switch.

(Witness indicates and marks.)

Q. And that switch that you have just marked leads to the easterly track shown on this plat?

A. Yes, sir.

Q. Counsel has also referred to the eighth track, now, without taking time to suspend this plat Def't's Ex. 3 upon the easel, I will just ask you if we are to understand, as I think perhaps may be already clear, that the eighth track in the yards is a track which continues right along from the northerly end to the southerly end of the yards?

A. Well, it would be the extension of the lead, it would extend not from the northerly end, but from the switch marked passing track switch—or "passing" it is marked here.

Q. Yes. The point I am getting at is this, so that the use of the name that it has been referred to as, a continuation of the lead, may be clear: If a train should come in, or an engine, upon the lead, going from the passing track down the lead past switch No.
106 1, that not being turned, and so past the other switches, if all of those switches remained unturned by the train crew, the engine would proceed right down to track No. 8?

A. Yes, sir.

Q. That is the plan and scheme of the yard?

A. Yes, sir.

Q. So that an engine coming upon the lead and desiring to go upon any one of the tracks numbered 1 to 7 will be turned from the leading track to that given track by a turning of the switch corresponding in number to the track?

A. Yes, sir.

Q. Now, one other point, the matter of frogs was referred to by counsel upon cross examination: are there different kinds of frogs?

A. Yes, sir.

Q. Now, how many are there, certain standard kinds?

A. Yes, sir, there are a number—or several different what is called numbers of frogs.

Q. That is the point exactly. Now, what are the different numbers of frogs?

A. Well, they run from, I believe, 3½ to No. 20.

Q. Now, what are the differences in frogs for? Or, to put it differently, why are the frogs different?

A. Well, as a rule on account of—they vary as the speed of trains for which this track is intended.

Q. Do you recall, Mr. Bryan, or not what number of frog
107 this one is that we have been referring to here where the main track and the passing track intersect?

A. That is a No. 14.

Q. Where two tracks approach each other not in a straight line,

that is, at a uniform angle, one of them at a curve, do you have in railroad engineering construction different standard curves or not?

A. Yes, sir, there are different——

Q. Now, can you tell us what is the name, in railroad engineering parlance, if you know, of the curve of the main track here as it approaches the passing track?

A. Yes, sir, that is a three-degree curve.

Q. And you have stated to counsel upon cross-examination that there is no uniformity of curvature of tracks. That is, as I understand you, the curvature will depend upon the location and purposes?

A. Yes, sir, different degrees of curvature.

Q. Different degrees of curvature, and for the reason that tracks will approach at different degrees of curvature, as I understand your testimony, the frogs will be different distances from the final standard distances of centers of tracks?

A. Yes, sir.

GEORGE C. STILES, sworn on behalf of defendant, testified:

By Mr. BRACELEN:

Q. Mr. Stiles, you live in Minneapolis?

A. I do.

108 Q. And have resided there for how long?

A. 23 years.

Q. And practicing your profession of law there during most of that time?

A. During that time.

Q. And in recent years you have practiced law in partnership or in connection with Mr. Devaney, the firm name of Stiles & Devaney?

A. Yes, sir.

Q. And are so practicing law at the present time in Minneapolis?

A. I am.

Q. Have you with you an original summons and complaint produced pursuant to a subpœna served upon you, wherein the plaintiff here is plaintiff and this defendant is defendant, in an action brought by the firm of Stiles & Devaney for the plaintiff in Hennepin county, Minnesota?

A. I have.

Q. Showing you papers purporting to be summons and complaint in an action in Hennepin County, Fourth Judicial District, in this state, Fulton M. Skaggs, plaintiff, against Illinois Central Railroad Company, as defendant, marked Def't's Ex. 5, I will ask you whether or not that is such original summons and complaint?

A. It is.

Q. Def't's Ex. 6 attached thereto is the return of the sheriff of service upon the railroad company at Albert Lea?

A. It is.

109 Mr. BRACELEN: Def'ts' Exhibits 5 and 6 offered in evidence.

Mr. BARTON: This is objected to as incompetent, irrelevant and immaterial, and before the court passes on that objection I would like to interrogate the witness on it.

The COURT: You may do so.

Mr. BRACELEN: Well, in view of this objection, I should like to lay a further foundation.

The COURT: Very well.

Q. You were also required by the subpœna served upon you to produce a certain contract in writing between Fulton M. Skaggs, this plaintiff, and either yourself or the firm of Stiles & Devaney, authorizing and empowering you to bring such action; have you such paper with you?

A. I have the written contract between Mr. Skaggs and my firm with me.

Q. May I see it, please?

A. So far as I am personally concerned, I make no point of the personal privilege or the fact that this is a privileged communication, and leave it for the plaintiff to make such objection as he sees fit.

Mr. BARTON: We object to this as incompetent, on the ground that it calls for a fact that the witness could only acquire through the relationship of attorney and client, therefore privileged.

Mr. BRACELEN: If the court please, as I understand it, the privilege of the statute goes to communications from client to attorney and goes no further. Clearly this document can't be anything in the nature of a confidential communication.

110 Mr. BARTON: I think that this might be cleared up without your honor ruling on that point by my asking a few questions.

The COURT: You may do so.

By Mr. BARTON: Have you ever seen the plaintiff in this case before today?

A. Not until a few minutes ago. I assume this is the plaintiff, at the head of the table.

Q. That is the man. Have you ever spoken to him?

A. Never.

Q. And never saw him until within a few minutes ago?

A. For the first time.

Q. Has the service of these papers marked Def't's Ex. 5, been done away with by stipulation between your firm and the attorneys for the railroad company, in the way of a dismissal of the action?

A. The action has been dismissed by stipulation between the attorneys for the railway company and our firm; a stipulation in writing filed in the office of the clerk of the court, in which the action was pending.

Q. So far as the contents of the paper entitled "complaint" is concerned, have you any personal knowledge of them at all?

Mr. BRACELEN: Just a moment. That is objected to as incompetent, immaterial, and as matter of defense. There is a pleading

here, counsel will have an opportunity upon rebuttal to meet the evi-
dence now offered, and in this connection I desire to state
111 further that the papers purport upon their face verity under
the law; that it cannot be the law that any corporation or any person can be taken solemnly into court by attorneys in a suit for $50,000 damages, and then his own attorneys in another suit, where that action has been brought, issue has been joined, be heard to exclude from the consideration of the court and jury in whichever action may be tried first the pleadings in the other action. Here is an action brought in Hennepin county before the action on trial was brought, papers were served, issue was joined, answer was filed, and under the law the cause of action set up in that complaint is presumably the plaintiff's cause of action. If he sees fit to explain it away in rebuttal, let him do so; that is matter of defense and is incompetent at this time.

Objection sustained.

Q. It appears by the Ex. 6 part of this paper, which you have identified as the sheriff's return of service, that service was made on the 11th day of February, 1913. At that time did you or your firm have any authority from Fulton M. Skaggs to start a lawsuit for him?

Mr. BRACELEN: That is objected to at this time, counsel, as I understand it, interrogating the witness merely upon the question of the competency of certain evidence now before the Court. He has a moment ago objected to the introduction in evidence of a contract which the witness says he has before him between his firm and this plaintiff.

Mr. BARTON: Well, but there were two questions, pend-
112 ing, if your Honor will recall. This is one of them, and, as I said, I thought this one might dispose of the other one.

Mr. BRACELEN: Well, I will withdraw that objection to the question as merely going to the question of foundation.

Last question read.

A. We did not on February, 1911.

Mr. BARTON: I submit, then, your Honor, that the offer of Ex. 5 and 6 in evidence is incompetent, irrelevant and immaterial in this case.

Mr. BRACELEN: Just a moment. I would like to examine him further.

Mr. BARTON: And also that the paper referred to as a contract would be irrelevant and immaterial and incompetent in this case. He hadn't any authority at that time; whether he had before or afterwards or not, wouldn't cut any figure.

The COURT: Do I understand you wish to inquire further?

Mr. BRACELEN: Yes, I do, your Honor.

By Mr. BRACELEN:

Q. You have the written contract between the plaintiff and your firm with you?

A. I have.

Q. And under and pursuant to that contract you represented him in the matter of a claim for damages for the cause of action set up in this complaint after the action was brought and until it was dismissed, which was very recently; is that true?

Mr. BARTON: That is objected to as incompetent, irrele-
113 vant, immaterial and leading. The witness is their witness now. It is leading, and embodying in the question facts, or apparently facts, in a written paper.

Objection overruled.

A. No.

Q. When was the action dismissed by stipulation of counsel upon both sides?

A. About a week ago, I think.

Q. About a week ago?

A. Yes, sir.

Q. By the firm of Stiles & Devaney for the plaintiff and the firm of Butler & Mitchell, of St. Paul, and of Richards & Coe, of Minneapolis appearing for the railroad company?

A. The stipulation was signed on behalf of plaintiff by Stiles & Devaney, on behalf of the defendant by Richards & Coe.

Q. Butler & Mitchell appeared upon the answer of the railroad company in the action which you brought, as attorneys, also, for the railroad company; is that correct?

A. I think so.

Mr. BRACELEN: I now submit, your Honor, the question of privilege as to the contract which counsel holds.

The COURT: I think that the contention of counsel that the contract would not be construed as a communication is the correct view. The objection is therefore overruled.

Mr. BRACELEN: I offer in evidence Def't's Ex. 7.

114 Mr. BARTON: Objected to as incompetent, irrelevant and immaterial, and the specific reasons I desire to call the Court's attention to is that it is privileged under the statute so far as Fulton M. Skraggs is concerned, and, second, that it appears by the witness' testimony already that the suit referred to was not brought under that, no authority existed for the bringing of the suit, therefore this paper would be wholly irrelevant and immaterial for any purpose in this action. Now, unless it will be the foundation for the introduction in evidence or as a part of the foundation for the introduction in evidence of exhibits 5 and 6, which purport to be the summons and complaint and the return of the sheriff thereon——

The COURT: I understand the object of its introduction is to show his authority.

Mr. BARTON: But the witness has testified he didn't have any authority when this suit was brought.

The COURT: No, he has testified, as I understand it, that on the 11th day of February, at the time the summonse was served, that he had no authority.

Mr. BARTON: That is right. Well, authority at some other time wouldn't cut any figure.

The COURT: But in the preparation of the documents of the summons and the complaint, acting under authority then for the plaintiff wouldn't it be proper testimony as affecting at least the credibility of the testimony of the plaintiff? It comes to that point, it seems to me.

115 Mr. BARTON: Now, you are getting to another feature of the situation. Counsel seeks to have Ex. 5, the complaint, go in evidence because he claims that a presumption would arise that the facts therein stated had been disclosed to the attorneys who signed it, and it would be for the client himself to disclaim, but it can have no such effect now, and outside of that there is nothing to it, it doesn't amount to anything, it is irrelevant and immaterial for any other purpose than simply to lay the foundation for the claim that the plaintiff must have made some other statements than those he has made in court, or different statements of the manner in which he got hurt from those he has testified to here in court, and I say you can only get that inference by showing the parties who signed the papers as attorneys had authority so to do, that is, so to institute suit, and the presumption comes from the institution of the suit by the attorneys. Now, the witness has disclaimed such authority at the time this suit was instituted. The preparation of it cuts no figure. No such presumption could arise until the papers were served, and the time they were served there was no such relationship existing between the attorney and his client as would be the foundation for any such presumption. Let me ask the witness one other question, if your Honor please, before you rule: Before these papers, this summons and complaint was served, was the paper Ex. 7 canceled by the plaintiff?

116 Mr. BRACELEN: That is objected to as incompetent.

Objection sustained.

Exception by plaintiff.

The COURT: And the objection to the offer of the exhibit is overruled. (Ex. 7.)

Mr. BRACELEN: I now renew the offer in evidence of Def't's Exs. 6 and 5.

Mr. BARTON: That is objected to as incompetent, irrelevant and immaterial, for the special reason that it doesn't appear that at the time those papers became official—or it appears at the time these papers became official in the way of a summons and complaint that the attorney signing the same had no authority so to sign them, or cause them to be served.

Objection overruled.

Mr. BARTON: Now, before this paper is read to the jury I would like to make some further inquiries of the witness, your Honor. I don't know that I am right, now, on this.

The COURT: Proceed.

Mr. BARTON: What I would desire to inquire about is how he obtained the facts that are stated in this paper. Now, he never saw

the plaintiff before, how could this paper be taken as a statement of the plaintiff? I don't know. I would like to inquire along that line.

The COURT: Proceed.

By Mr. BARTON:

Q. Did your partner, Mr. Devaney, ever see the plaintiff personally?

117 A. Well, of course I can't know that of my own personal knowledge, except what he said to me. I have a pretty strong opinion about the fact all right.

Q. Well, so far as you know, anything you have seen or heard, did Mr. Devaney ever see the plaintiff?

A. No. On the contrary, I know that he never has seen him in his life.

Q. So far, then, as any statements made in this complaint are concerned, you didn't acquire the information upon which they were made from the plaintiff personally?

A. We did not.

Q. Did you acquire them from any paper signed by the plaintiff or purporting to be signed by the plaintiff himself?

A. No, sir.

Mr. BARTON: I submit, then, your Honor, that this paper, the complaint, should not be read to this jury, and I object to it as incompetent, irrelevant and immaterial, and move to strike it out from the record because it now appears affirmatively that the statements made in that complaint could not be used for the purpose of impeaching his testimony in this case; he could never have told the attorneys, in fact, because he never saw them; he has made nothing in writing to them, so how could anything that they might put into a paper be used against this man?

Mr. BRACELEN: Your Honor, if that were true, of course, every time a man down in Illinois saw fit to come up to Minnesota

118 and let the courts of this state try his cause of action and bring a railroad company from the state of Illinois into a state where it happened to have ten miles of railroad, we would have no means of contradicting him under these circumstances. Now, as I conceive the law, and as I understand the authorities, it is the law that a letter of an attorney who is in court upon the records representing his client is admissible in evidence under the peculiar agency which the law says exists between attorney and client. I don't care to discuss it at length—if your Honor has any doubt about this proposition I would like to call the Court's attention to some authorities.

Mr. BARTON: But we haven't got even so much as a letter here.

Mr. BRACELEN: We have got the pleading; we have got the solemn complaint and summons in court by reputable counsel and it speaks verity upon its face. Attorneys are every day going into court representing their clients under those circumstances.

Objection overruled.

The summons and complaint, marked Def't's Exhibits 5 and 6, was read to the jury.

Cross-examination.

By Mr. BARTON:

Mr. BARTON: Mr. Stiles has told counsel on both sides that he would like to explain his position a little here.

119 The COURT: Very well.

Mr. BARTON: And then I have a question or two that I want to ask him, also. The explanation he wishes to make is the apparent difference between his saying that he had no authority to do this, etc., and he asks an explanation.

WITNESS: I should like to say that on Saturday before February 10th I dictated the summons and complaint which have been introduced in evidence here, and directed that they be mailed to the sheriff at Albert Lea for service on the agent of the Illinois Central Railroad Company, in this action, and supposed that this had been done. On the following Monday morning, February 10th, at 10:40 o'clock, I received a registered letter signed by Mr. Skaggs, bearing date February 7th, which I have in my hand, directing us to take no further steps in his case, take no further action in regard to his case until notified by him. At that time I supposed that the summons and complaint were in the hands of the sheriff for service and possibly had been served. Later I learned, during the day, that in fact that complaint and summons had not been mailed until the same Monday morning at about a few minutes past 9 o'clock on the 10th. That is why I said that on February 11th, Tuesday, when the summons and complaint in fact were served, I didn't—or my firm didn't have authority to serve it. That is the only explanation I have to make, except I should be glad to introduce the letter and envelope in evidence, if counsel care for it.

120 Mr. BRACELEN: I should like to have them identified and put in evidence.

The letter and envelope were marked Defts.' Ex. 8 and Defts.' Ex. 8-*a* and offered in evidence.

The COURT: No objection.

Mr. BARTON: No, I haven't any objection to make. I don't make any objection, for the reason that I want it the basis of a motion. I perhaps have been very thoughtless or I would have made some more objection than I have. I didn't think about the plaintiff's right arm being off and therefore probably he didn't write his name, and I see now both by the letter and by the alleged contract, it doesn't purport that he has signed it, excepting that there is a mark there. Mr. Stiles, what do you know about that, anything? Have you any explanation?

WITNESS: No, personally I don't know anything about it except what was reported to me.

Q. The letter, I see the name Fulton M. Skaggs written on it, and then there is above the name "His," and below, the work "Mark" and

then between the word "His" and the word "mark" there is a cross. I suppose that is all you know about that as to who made it, you don't know anything about it?

A. I haven't a bit of personal knowledge; all I know is I received it in the mail at the time stated.

Q. Now, I notice that on Defts.' Ex. 7 the signature is made in just the same way here, that is, I mean the name Fulton M. Skaggs is written there and then the word "His" and the word
121 "mark," and a cross between the word "His" and the word "mark." That is all I suppose you know about that?

A. Excepting from hearsay; I know what was reported to me by Mr. Devlin, who brought the contract into our office at the time I received it.

Q. Now, Mr. Stiles, concerning the question of the contents of this complaint, you have said that you never saw the plaintiff before today, therefore I take it you didn't get any personal information from him as to the contents of this complaint.

A. I never did.

Q. Either by letter or by any written paper signed or purported to be signed by him.

A. I have never received any information from the plaintiff, Mr. Skaggs, in any way whatever except this letter, and I think a subsequent one.

Q. And neither of these letters contained any statement of fact as to how he got hurt?

A. Not a single fact, no, sir.

Q. Well now, did you get this information from anyone who claimed that Mr. Skaggs had made any such statements as are contained in this complaint?

A. No, sir. The fact is that Mr. Davlin, whose name appears on the contract under the name of Mr. Skaggs, came into our office and brought this contract and reported this case to us and stated that he had talked to one or two of the trainmen in the yards there at Freeport, I think, and from them had learned substantially these facts which are set out in the complaint. I drew the complaint
122 from what he reported to me orally—or to us, me and Mr. Devaney,—and amplified and enlarged and extended them so as to cover things which might naturally have occurred from the general broad statements that he reported to us. Beyond that I know nothing about the case or the facts.

Mr. BARTON: I now move to strike out of this case as evidence Exhibits 5 and 6 as incompetent, irrelevant and immaterial, first, because it appears that that suit, if it was ever started, has been dismissed and disposed of by stipulation between the attorneys for the defendant in this action and the attorneys who instituted the action; second, because it appears that the attorneys at the time of the service of the said alleged summons and complaint had no authority to institute it; third, because it appears that the complaint was framed upon facts secured from others than the plaintiff himself and therefore they could not be in any way used for the purpose of contradic-

tion or impeachment; and for the purpose of showing that any prior action is pending here it is irrelevant and immaterial, because it isn't pending, it has been dismissed. Therefore it does seem to me that in no sense has this any place in this lawsuit. And then I may say, too, further, as another specific objection, that it now appears that the only authority for ever preparing, let alone serving these papers, is that contained in a paper which does not purport to have been
123 signed by the plaintiff at all, it isn't his signature, the testimony shows it isn't his signature; that is, that he didn't write his name there, and where one makes simply a mark you have got to prove by somebody—it doesn't prove itself. So that there is no evidence now here at all that the attorneys ever had any right whatever to prepare the complaint, let alone serve it.

By Mr. BRACELEN:

Q. This contract, Defts.' Ex. 7, is signed "Stiles & Devaney, Attorneys, by H. R. Davlin?"

A. Yes.

Q. Mr. Davlin represented you at that time and had for some time before and has since?

A. Mr. Davlin represented us for about three months during the fall of 1912, and then left our service and employment and went to his home in South Dakota, and at the time this Ex. 7 was delivered to us he wasn't in our employ in any capacity, and hasn't been since about the 5th or 10th of November last.

Q. I don't care whether he was in your employ or not, Mr. Stiles; as I understand it, you have acted in this matter under and pursuant to this contract signed "Stiles & Devaney, by H. R. Davlin," is that true or not?

A. Yes, sir.

Q. You recognized him as your agent in the matter?

A. With authority to sign this contract for us, and ratified it and acted on it in good faith

Q. Yes, and I understand the purport of your last answer
124 to be that while he represented you he wasn't being paid for his services in the matter?

A. Yes. He wasn't employed by us at all.

Q. You mean not regularly in your employ or——

A. Not at all. Not in any way at all. He is a brother-in-law of Mr. Devaney, and he was visiting at Amboy or some other point there for some little time, I don't know how long, but while there it appears he learned of this case, and because of his relationship to my partner, Mr. Devaney, sought to secure the business for our firm, with the result that he brought this Ex. 7 into our office when he returned from his visit.

Q. Where is Mr. Davlin now, do you know?

A. I don't know. I think he is at his home in South Dakota, and I don't even know just where his home is in South Dakota.

The COURT: It appearing that the contract Ex. 7 was not signed by the plaintiff, it appearing further affirmatively that the allega-

tions contained in the complaint are not based upon information received from the plaintiff, being no evidence to connect the plaintiff with it in any manner, the motion is granted.

Exception by defendant.

A. A. CARMICHAEL, sworn on behalf of defendant, testified:

By Mr. BRACELEN:

Q. Mr. Carmichael, you live at Amboy?

A. I do.

Q. Illinois?

125 A. Yes, sir.

Q. And are the station agent of the defendant company there, I believe?

A. Agent and general yardmaster.

Q. Agent and general yardmaster?

A. Yes, sir.

Q. Where is your place of work there in your employment, at the station?

A. No, that is all over the yard, everywhere in general, all about the station; I have full charge of the station and the handling of the trainmen.

Q. Whole charge of the station and yards?

A. Yes, sir.

Q. And that has been true for how long a time?

A. Since the 1st day of December, 1904.

Q. Since December 1, 1904. Before that time had you been in the employ of this company?

A. Yes, sir.

Q. I hand you three photographs, marked Defts.' Ex. 1, 2 and 9; directing your attention first, however, to Ex. 1, will you identify that, if you can?

A. Yes, sir.

Q. What does it represent?

A. It represents the house-track, main line, passing-track and a view of the entire yard and north main line switch.

Q. Where?

A. At Amboy, Illinois.

Q. I don't know whether you know or not when or by whom this photograph was taken.

A. I do not.

126 Q. You don't?

A. No, sir.

Q. I will ask you whether or not, Mr. Carmichael, that photograph shows correctly the conditions at the point which you have described as they existed there, so far as the location of objects, tracks, buildings, etc., is concerned, as they existed on January 13th of this year.

A. Yes, sir, they do, exactly.

Q. Defts.' Ex. 2, what does that show?

A. That represented the Illinois Central freight house, house-

track with cars standing upon it, the flagman's house, Division street crossing, main line, passing-track, a portion of the north end of No. 2 and 3 tracks, and the entire view of the north end of Amboy yard, Amboy, Illinois.

Q. This photograph Ex. 2 is looking in which direction?

A. That is looking north as you look at the picture.

Q. Yes, and the track to the right of the photograph, or the easterly track, is what track?

A. That is the house-track, the easterly track.

Q. Well, you refer then to the track upon which cars are standing?

A. That is the most easterly track, the extreme east track.

Q. I see, upon which freight cars are shown to be standing?

A. Yes, sir.

Q. That is in the rear of the flagman's or gateman's house shown?

127 A. Yes, sir.

Q. Now, the track directly in front of the gateman's house, what track is that?

A. The main line.

Q. And the one next to it?

A. The passing-track.

Q. And then?

A. A portion of the north end of No. 1.

Q. No. 1 track, and I believe you said part of No. 2 track also?

A. Part of No. 2 and a very small part of the switch-points just about in view, of No. 3. You couldn't, unless you were thoroughly acquainted with the yard, you wouldn't know what it was.

Q. As to No. 3?

Q. Yes, No. 3. But tracks No. 1 and 2, it is a plain view of the north end.

Q. I see on the photograph certain coal-cars or flat-cars with the boxing up; those you describe as coal-cars, do you?

A. Those are coal-cars, yes, sir, Illinois Central coal-cars.

Q. Upon what track are those standing?

A. Those are standing upon what we call the C. B. & Q. wye interchange track.

Q. Interchange track on the C. B. & Q. wye. I wish you would point out, Mr. Carmichael—the purpose of this is merely to relate all of these exhibits one to the other so there will be no confusion—where that wye is on the plat Defts.' Ex. 4, if it is shown there.

A. Yes, right here. (Indicating.)

128 Q. Precisely. So that the coal-cars shown in this photograph Ex. 2 are standing——

A. Standing upon this track.

Q. Standing upon this track which you now point out on the plat. Does this Ex. 2 likewise show or not, what is the fact about that, conditions with reference to the locations of tracks and objects shown therein, as they existed during the month of January of this year?

A. Exactly.

Q. Now, showing you Defts.' Ex. 9, without going into any de-

tailed inquiry about that exhibit, just explain to the Court and jury the difference between Ex. 1 and Ex. 9, as to what they show.

A. The difference between Ex. 9 and Ex. 1 is that Ex. 9 shows the C. B. & Q. junction while Ex. No. 1 does not, doesn't extend far enough to the north to include the junction.

Q. Precisely. In other words, the camera is standing on the main line looking in which direction in both pictures?

A. South.

Q. Looking south in both pictures?

A. Yes, sir.

Q. The only difference is that in No. 9 the camera has been taken farther north across the C. B. & Q. junction, and includes that?

A. Yes, sir.

Q. Now, what switch is this switch shown in Ex. 1?

A. The main line switch.

Q. At which end of the yards?

129 A. The north end of Amboy yards.

Q. The most northerly end of the yard?

A. The extreme north main line switch.

Q. And the tracks which converge at the switch in Ex. 1 are what tracks?

A. Passing-track and main line.

Q. The passing-track to the right?

A. The passing-track to the right and the main line to the left looking toward the picture.

Q. This picture Ex. 1 is taken looking south, I believe you stated?

A. Yes, sir.

Q. Now, Ex. 9 shows a switch also in the foreground of the picture; what switch is that?

A. The north main line switch, at the north end of Amboy yard.

Q. Do you know, Mr. Carmichael, how far, or can you estimate if you don't know exactly how far, the C. B. & Q. junction tracks are north of this main line switch?

A. Yes, sir. Twenty-eight feet.

Photographs, Def'ts' Exhibits 1, 2 and 9 introduced in evidence without objection.

Q. Were you on duty at night when the plaintiff, Mr. Skaggs, was injured there at Amboy?

A. No, sir, not after 11:30 p. m., the 12th.

Q. You left duty at what time?

A. 11:30 p. m. the night of the 12th.

Q. 11:30 that night?

A. Yes, sir.

130 Cross-examination.

By Mr. Barton:

Q. Do I understand that in all three of these photographs the camera was looking south?

A. No, sir, the camera was looking north in this picture.

Q. You are referring to Ex. 2. When you say the camera was looking north, is that right?

A. Except Ex. 2 I would think the camera was looking north.

Q. You were not present yourself when these photographs were taken?

A. No, sir, I knew nothing whatever of them.

Q. And you give it simply as your opinion that Ex. 2 must have been taken from the position looking north?

A. Yes, sir.

Q. And why do you come to that conclusion?

A. For the reason that there isn't any of the picture shown except an appearance of the picture of about twenty feet south of the south sidewalk of Division street crossing; the extreme north end of the yard is in view on the picture.

Q. So that whatever this does show, it shows looking northward?

A. Yes, sir.

Q. Exhibits 1 and 9, were they not both taken looking south?

A. Exhibits 1 and 9, I would say the camera was looking south, in a southerly direction.

Q. Now, if I may just call your attention,—both of these
131 photographs, 1 and 9, show a switch-stand and the rail switch-points; is it the same switch?

A. Yes, sir.

Q. And that is the north main line switch at the yards at Amboy?

A. That is the extreme north switch at the north end of Amboy yards.

Q. And it connects the passing-track with the main line?

A. With the main line, yes, sir.

Q. And we see the track at the left is curved while the track at the right is straight in both photographs.

A. Yes, sir, the passing-track is straight.

Q. The track which corresponds with the main line north of the switch is straight?

A. Yes, sir. The main line is straight out of the yard.

Q. So that these photographs would seem to show the straight track as the main line, while the fact is the straight track south of this switch is the passing-track and the curved track which is the track to the left is the main line?

A. Yes, sir, the track to the left is the main line.

Q. And the straight track, or the one appearing in these two photographs, Exhibits 1 and 9, to the right, is the track from which the lead to the railway yard, consisting of some eight tracks, is connected?

132 A. The tracks in the yard all connect from the lead which runs from the passing-track south of the main line switch.

Q. Yes, and at a point just a little south of what is disclosed plainly in these two photographs 1 and 9?

A. Yes, sir.

Q. So that the yard is connected with the passing or straight track as shown by these two photographs 1 and 9 at a point just below where we can see on this photograph?

A. Yes. You will notice the yard connects from the passing-track just below the main line connection.

Q. Now, just one other question: These photographs would apparently show a very abrupt curve on the main line where it leaves the passing-track, while the drawing we have here doesn't do that; what is the explanation?

A. This is the main line running here on a curve, just the same as it is shown in the picture; this is the passing-track running through here, a straight track.

Q. Well, but you didn't catch the purport of my question: These photographs 1 and 9 both seem to show a very abrupt curve of the main track where it goes off from the passing-track, while this doesn't show any very abrupt curve.

A. Well, there isn't an abrupt curve.

Mr. BRACELEN: I object to that as counsel's conclusion and not proper cross-examination.

Question withdrawn.

133 By Mr. BRACELEN:

Q. This is not on re-direct properly, but I think I will identify another photograph, perhaps the jury might like a photograph looking the other way. Showing you Def'ts' Ex. 10, Mr. Carmichael, will you state what that is?

A. Yes, sir, that is a photograph of the north end of Amboy yard.

Q. Looking which way?

A. Looking in a northerly direction, showing a short portion of the north end of the house track, a short portion of the north end of the main line, a small portion of the north end of the siding and passing-track, and a short portion of the C. B. & Q. wye interchange track.

Q. The straight track shown approximately at the center of this photograph, and being straight throughout its length shown in the photograph, is what track?

A. That is the passing-track.

Q. And the track next to it, to the right or toward the east, is what track?

A. Is the main line.

Q. And the one to the extreme right is——

A. The house-track.

Q. —the house-track. The switch shown farthest in the background of the picture is what switch?

A. That is the extreme north main line switch at the north end of Amboy yard.

Q. Now, as I recall the other photographs, two of which
134 you have identified, they were both—and which show this same portion of the yards—they were both looking south, while this one is looking north?

A. Yes, sir.

Def'ts' Ex. 10 introduced in evidence without objection.

C. H. SCHMIDT, sworn on behalf of defendant, testified:

By Mr. BRACELEN:

Q. Mr. Schmidt, where do you live?
A. Freeport, Illinois.
Q. And how long have you lived at Freeport, Illinois?
A. You mean how long have I made my home there, or since I have been railroading, how do you mean?
Q. Well, in a general way, wherever you live, how long have you made your home there?
A. Well, since 1910, in January.
Q. How long have you been in the employ of the defendant company?
A. Since February, 1906.
Q. Are you at the present time in the employ of the Illinois Central Railroad?
A. Yes, sir.
Q. And what is your employment?
A. Locomotive engineer.
Q. And how long have you been a locomotive engineer for this company?
A. Since October the 17th, 1910.
135 Q. What run do you have as locomotive engineer, freight or passenger, at the present time?
A. I haven't any at the present time.
Q. What was your last run, freight or passenger?
A. You mean that I am on now?
Q. The last one you were on as engineer, was it freight or passenger?
A. Freight.
Q. During the month of January of this year you were in the employ of this company in what capacity?
A. Freight service.
Q. Freight service, as engineer?
A. Yes, sir.
Q. And where was your run, between what points, during the month of January?
A. Well, being an extra man you had the run between Freeport and Clinton, or between Freeport and Amboy, and return.
Q. Was that true of you during the month of January?
A. Yes, sir.
Q. That is, as I understand it, you would run sometimes from Freeport to Clinton and return, and sometimes from Freeport to Amboy and return?
A. Well, what we call them turn-around trips, we make them the same day. And of course when we go through, we call it a through run, and we get our rest down there the same as we do when we get back.
136 Q. That is to say, Amboy is a station between Freeport and Clinton?
A. Yes, sir.

Q. And when you made a trip from Freeport to Amboy, that was a short run and you would make it in one day up and back?

A. Yes, sir.

Q. You were the engineer on the train in question on the night of January 13th when Mr. Skaggs was injured?

A. The morning of the 13th.

Q. The morning of the 13th?

A. Yes, sir.

Q. When Mr. Skaggs was injured. Before you came to Amboy, somewhere up the line, had you learned anything as to any work of the train to be done at Amboy?

A. Yes, sir.

Q. What had you learned?

A. Well, going to set out short loads at Amboy, which was two Dunbars.

Q. What is that?

A. It was the Dunbars.

Q. Two Dunbars?

A. Yes, sir.

Q. What do you mean by short loads?

A. Well, they are not to go to Freeport: we call them short loads, you know; Freeport being destination, anything short previous to that, you know, we call short loads.

Q. And why do you call them Dunbars?

137 A. Well, because that is where they are set out at.

Q. That is, they were to go to Dunbar?

A. Yes, sir.

Q. And Amboy is a division point on the Illinois Central Railroad?

A. Yes, sir.

Mr. BARTON: Mr. Bracelen, the stipulation in this case was that these two cars were to go to Stockton, as I remember: you are proving something different from the stipulation.

Mr. BRACELEN: Well now, yes, I will simply state I have asked for the explanation. These men have been calling them Dunbars. Now, it may appear in the record, which is just as satisfactory to counsel, I am sure, that these cars were bound for Stockton, but they would go from Amboy to Dunbar, and from there, by the Great Western, to Stockton.

Mr. BARTON: Very well, that may be made, then, a part of the record as an explanation why he says Dunbar while the stipulation says Stockton.

WITNESS: Well, we naturally call them that way; of course, we know they were transfers.

Q. You know they were two——

A. Well, I knew they were transfers, but we always called them Dunbars, because we always set them out there.

Mr. BRACELEN: You may understand Mr. Barton, so far as the legal effect is concerned, the defendant stands upon the stipulation.

138 Mr. BARTON: Very well; I just wanted to know why there was any difference.

Q. Where and how did you learn that there were two Dunbars to be set out at Amboy?

A. Because when we stopped at Mendota we ate there, and the conductor says "We will eat here and do our work at Amboy, set out the two shorts."

Q. I see.

A. And Mendota is a watering station.

Q. How far is Mendota from Amboy?

A. Sixteen miles.

Q. You say "we ate there"?

A. Yes, sir.

Q. Who ate there, which ones of the crew?

A. The conductor, the flagman, head brakesman and myself.

Q. And what about your fireman?

A. I asked him if he wanted to eat there, he says no, he would wait until he got to Amboy and he would take in water for me.

Q. While you were eating there what was he doing?

A. Taking water.

Q. That is, there is a water-tank there?

A. Yes, sir.

Q. And the tank in the tender was filled with water at Mendota?

A. Yes, sir.

Q. Now, as you came into Amboy, when you came into the station at Amboy, just state to the Court and jury the movements of the fireman; what did he do?

139 A. The fireman, after he got off just before we stopped, he went over to get a bite to eat.

Q. Went over where?

A. Over to the restaurant.

Q. Will you state what the practice is?

A. It is customary; it is done every day.

Q. Now, as you came into Amboy, what is your recollection as to where you made the stop?

A. Well, the engine stopped in the clear of Division street crossing.

Q. Stopped in the clear?

A. Yes, sir.

Q. Of the Division street crossing?

A. Because it is the only street crossing there is separating the two sides of the town, and it is the only street opening, and you have got to keep it clear all the time for traffic; not supposed to keep it blocked.

Q. You say you stopped in the clear of the Division street crossing; be more accurate than that, if you can, if you have any definite recollection.

A. Well, we stopped short of the crossing, so we wouldn't block it.

Q. Now, what was the next movement of the engine made?

A. Well, after the train crew came out of the depot the cars were cut off and we pulled on up and set out the—up beyond the main line switch.

Q. You pulled beyond the main line switch how far, can you give us an idea how far beyond the main line switch on that first movement after the cars were cut off from the train?

140 A. Well, I couldn't say definitely, because being the distance of the rear end of the cars we had to the engine, but until I got a signal to stop.

Q. What time of the night was this?

A. It was about 2 o'clock.

Q. And how was it as to being cold?

A. Yes, sir.

Q. It was cold?

A. Yes, sir.

Q. And how was it as to being a dark night?

A. Yes, sir.

Q. Dark night?

A. Very dark.

Q. How is that?

A. Very dark.

Q. You take signals, of course, by the white lanterns carried by the train crew?

A. Yes, sir.

Q. And your train crew consisted of the fireman—Murphy, is that his name?

A. Yes, sir.

Q. And Mr. Skaggs, plaintiff, as head brakeman?

A. Yes, sir.

Q. And Buehta as rear brakeman?

A. Yes, sir.

Q. And Lichtenberger as conductor?

A. Yes, sir.

Q. After you pulled north of the main line switch what did you do then?

A. I waited until I got a signal to back up, and I backed up.

141 Q. From where did you get the signal?

A. From a man on the ground, at the switch.

Q. And on which side of the track is the switch at that point?

A. Right-hand side coming north.

Q. And on which side does the engineer work?

A. Right-hand side.

Q. And you were on the right-hand side?

A. Yes, sir.

Q. You got a back-up signal and backed up how far?

A. Until I got a stop sign.

Q. Do you remember how far you backed up with your engine, that is, as to whether you backed down to the switch or not?

A. Just about the switch.

Q. Just about to the switch. From whom did you get the stop signal?

A. Being dark, I couldn't say.

Q. Well, I mean did you get it, if you know, from a brakeman on the string of cars that you were moving?

A. Yes, sir.

Q. You could tell that by his position, by following the lantern?

Mr. BARTON: Well, don't lead him.

Q. Very well, I will ask you how are you able to determine that the signal came from a brakeman working on the string of cars you were moving at the time?

A. Because I saw him jump off: he rode the cars and jumped off and gave me a stop signal.

142 Q. What was the next movement, Mr. Schmidt, that the engine made?

A. The next movement I got a go-ahead signal.

Q. And you pulled ahead on that signal?

A. Yes, sir.

Q. And you pulled ahead to what point?

A. Well, until the rear end was beyond the passing-track switch, until I got a stop signal.

Q. You pulled clear of the passing-track switch and got a signal to stop?

A. Yes, sir.

Q. Then what movement did you make?

A. I waited until I got a signal: the switch was turned, and I waited until I got a signal, and I backed up.

Q. You were then backing up with your string of cars upon what track?

A. The main line.

Q. Upon the main line, and you backed up, you say, until you got a stop signal?

A. Yes, sir.

Q. You stopped on that signal. As you sat in the cab that night doing the work, I want you to describe to the jury your position: so that we will have it clear here, just how does the engineer—or did you in doing that switching there that night that you have been describing, sit in the cab?

A. I sat with my foot balanced up on the window sill.

Q. Up on the window sill?

A. Yes sir, what they call an arm-rest along the bottom of the window.

143 Q. That is a window on the side of the cab, is it?

A. Yes: it is a double window.

Q. How is that?

A. It is a double window: it opens about that wide. (Indicating.)

Mr. BRACELEN: Indicating five feet, perhaps, Mr. Barton.

Q. How wide is that window, do you suppose, double window?

A. About four and a half, five feet.

Q. About four and a half or five feet. Now, in that position your back is which way with reference to the front and rear of the train and the sides of the engine?

A. You are facing the motion of the train, the direction the motion of the train is going: I was backing up and I was looking back.

Q. I see. In taking signals what position do you take to receive the signal? I want to know whether or not there is any facility there for getting your head out beyond the side of the cab or not.

A. Yes, sir.

Q. Now, the engine moved back on the main line until you got a stop signal, when you stopped, and the next movement was what?

A. The next movement the engine was cut off.

Q. Where did you get the stop signal from before the engine was cut off; the last stop, in other words, before the engine was cut off?

A. From the head man.

144 Q. Skaggs, the plaintiff?

A. Yes, sir.

Q. Where was he when you got the stop signal?

A. Well, he was on the ground along just about the rear of the engine.

Q. On which side was he at the time the engine was cut off?

A. The right side.

Q. You then got, after the engine was cut off, a go-ahead signal?

A. Yes, sir.

Q. From which side of the engine did you get the signal?

A. The right side.

Q. And from whom?

A. The head brakeman.

Q. At that time how far, if you remember, was the engine, the front of the engine, from the main line switch?

A. I don't recollect.

Q. You started ahead and ran how far before stopping?

A. Just about over the switch.

Q. Did you clear the switch or not?

A. Yes, sir.

Q. You say just about over the switch, you mean just enough to clear the switch, or what do you mean?

A. Well, maybe four or five or six feet over.

Q. You had then the light engine?

A. Yes, sir.

Q. When you moved forward with the engine at that time,

145 state, if you know, whether or not the plaintiff rode forward with the engine?

A. Yes, sir.

Q. And where was he riding?

A. On the rear end of the tender.

Q. When you got over the switch, clearing the switch?

A. He jumped off at the switch and gave me a stop signal.

Q. Jumped off and gave a stop signal?

A. Yes, sir.

Q. Upon which you stopped?

A. Yes, sir.

Q. Now, the plaintiff has testified, Mr. Schmidt, that he gave a signal for you to go ahead after the engine was cut off, and that you pulled up perhaps a carlength, when he swung you down or gave you a signal to stop and you stopped; what is the fact about that?

Objected to as incompetent, irrelevant, immaterial and leading. Objection sustained.

Q. After you got a go-ahead signal—the light engine, now, being cut off—was there any other movement of the engine whatever? If so, what was it? Just state the facts fully, between that time and the time that you cleared the main line switch and stopped.

A. No, sir.

Q. After you got the stop signal and the switch was thrown, what signal did you then get?

A. Got a back-up signal.

146 Q. From which side of the engine?

A. Right side.

Q. And from whom?

A. The head brakeman.

Q. And did you back up?

A. Yes, sir.

Q. Now, what happened as you were backing up at that time?

A. Well, in backing up I gave the engine steam and let her drift; sat up in the window and watched for a signal from the head brakeman, and finally he disappeared in about a second or so, why, it just seemed that quick.

Q. Speak up as loud and distinctly, Mr. Schmidt——

A. It just seemed at that moment that the head brakeman disappeared or his lantern disappeared or went out, I didn't know which it was, at the time that top scraped alongside these cars.

Q. Now, you say he disappeared or his lantern disappeared or went out and you scraped these cars; what cars do you refer to?

A. These cars that were left standing on the main line.

Q. And what was the scraping, what scraped the cars?

A. The tender.

Q. What did you do when the tender and the cars, the head end, began to scrape?

A. Stopped as quick as possible.

Q. You spoke a while ago of starting her back and letting

147 her drift; what do you mean by letting her drift? explain that.

A. Well, give the engine steam, you know, they will carry so much steam anyhow, and you shut off your throttle and they will drift on a ways just naturally, as going down the hill you can shut off steam quite a ways and they will drift all the way. We call that drifting.

Q. You were then going with the engine upon what track?

A. Passing-track.

Q. The passing-track at Amboy. Now, what apprised you first of the contact between the tender and the cars standing there? How did you first know that they had struck—noise, or could you feel it in the engine, or what? What is the fact?

A. Why, just a little rumble.

Q. You then stopped the engine?

A. As quick as I could.

Q. And what did you do?

A. The first thing I done, I hollered "Skaggs, are you hurt?" Getting no reply but a moan, I lit my torch and jumped off the opposite——

Q. Now, so that the jurors can hear——

A. I hollered, "Skaggs, are you hurt?" and I got a moan out of him, lit my torch and got off the opposite side of the engine and walked around the back and found him laying there.

Q. This torch, what kind of a torch is that?

A. Well, it is a regular kerosene torch with a wicking in it.

148 Q. Such as enginemen have on their engines regularly?

A. Yes, sir.

Q. And you lighted that when you heard the moan and went back there; where was Mr. Skaggs at that time?

A. Lying between the passing-track and the main line.

Q. And how close to the passing-track?

A. Well, he was laying just about the middle of the two tracks.

Q. And where with reference to the rear of the tender?

A. Well, he was laying a little—the cars were being cornered that way, he was laying right in the middle of them.

Q. Of the tracks?

A. Yes, sir.

Q. But I want to know how far was he, or where he was with reference to the rear end of the tender?

A. Well, not over three or four feet back of it.

Q. Three or four feet back, and between the tracks?

A. Yes.

Q. Now, you found him hurt there; what did you then do next? just tell. I want you to tell the thing to the jury as you remember it in your own way.

A. Well, the minute I got down there and saw that Skaggs had been hurt, I commenced hollering for Buck—Buchta, we

149 always called him Buck as short,—and getting no reply, Skaggs said to me, laying there, he says, "Help me out of this water," and I says "Well," I says, "I will have to get help." So I immediately got up on the engine and tooted the whistle.

Q. Now, let's see, you found him hurt there, and you hollered for Buck?

A. Yes, sir.

Q. And who is Buck?

A. He is the rear brakeman, or the flagman.

Q. How did you holler for him?

A. I hollered "Oh, Buck."

Q. Loud?

A. Yes, sir.

Q. Did you get any response?

A. No, sir.

Q. Then you went back to the engine and tooted the whistle?

A. No, I told Mr. Skaggs that I was going up to toot the whistle to get some help; I made that remark as I was just going by.

Q. And you did that?

A. Yes, sir.

Q. Now, by tooting the whistle, generally explain what did you do and what was that for?

A. By tooting the whistle I wanted to get some help.

Q. Is that a signal that you, as a railroad man, knew would be understood?

A. Yes, sir, or danger.

Q. It would call help to you?

A. Yes, sir.

150 Q. And that is, I suppose, two short, sharp blasts of the whistle?

A. Yes, sir.

Q. Now, did help come?

A. Yes, sir.

Q. Who came first?

A. Mr. Buchta.

Q. Now, let me go back a moment. After you blew the whistle sharply in this fashion then what did you do?

A. I come back off of the engine and stood by Mr. Skaggs.

Q. Now, where did you first see Buchta?

A. Well, he was coming around along about Division street there back of these cars; obstructing the view there, you know, I didn't see where he was at in the yards.

Q. I want you to give us as close a statement as you can, according to your best recollection, of where Buchta was after you had called for him and had blown the whistle and had gone back again to Skaggs, when you first saw him approaching.

A. I saw him coming around from the rear, back of these cars some place, about Division street.

Q. About Division street. And when you say from the rear or back of these cars, what cars, Mr. Schmidt, do you have reference to?

A. These two that had been set out, that was left standing on the lead.

Q. The two Dunbars, in other words?

A. Yes, sir.

151 Q. I will ask you to help me here, if you will, Mr. Schmidt, get this plat up (pinning plat on easel), because I want you to stand here anyhow. (Witness steps down from witness-stand.) Now, if you will just stand there I will get a pointer; there is a stick back there to use for a pointer. Did I call your attention to this plat in Mr. Butler's office yesterday evening or not?

A. Yes, sir.

Q. You saw it. Well, calling your attention to it now, then, you will notice, so that you don't confuse this plat, which is now Def't's Ex. 3, with the larger scale plat, which is 4, I call your attention to the location of the passenger depot, main line switch, so marked, and to various tracks, to Division street crossing; now, where was the engine standing, as near as you can tell, when you stopped and found Skaggs hurt?

A. Right along about in here. (Indicating.)

Q. The witness is pointing on the plat (so that the record may show) to a point approximately at the switch marked "House-track", pointing to the passing-track.

A. It didn't clear the main line very well.

Q. When you say it didn't clear the main line very well you are speaking of the rear of the tender?

A. Yes, the rear of the tender, after it scraped. Of course, that would allow little spaces between where they were closer together a little farther ahead.

Q. By the way, what was the relative position of the rear
152 of the tender and the front end of the car that it scraped when you got back there? In other words, did they slip past, one past the other?

A. Yes, sir.

Q. How far?

A. Very near the length of the tender.

Q. And what damage, if any, was done to the tender?

A. Nothing, only knocked off the handle, or grab-iron, what we call it, that is on the rear of the tank.

Q. That is, a grab-iron at the rear of the tank on the side?

A. Yes, sir; well, it is just on a corner, you know, for a brakeman to ride or to hang on.

Q. I understand, and that, you say, had been scraped or knocked off?

A. Yes, sir.

Q. And do you say that was the only damage done to the tender?

A. Yes, sir.

Q. What was the position of the side of the tender and the front end of that car? That is, did they remain in contact when you stopped the engine or——

A. Yes, sir.

Q. They were tight against each other?

A. They were snug together.

Q. Now, you say that the tender scraped past almost the entire length of the tender?

A. Yes, sir.

153 Q. How far would that be in feet, according to your best impression?

A. Well, about thirty feet, twenty-five feet.

Q. Twenty-five, thirty feet?

A. Of course, I never measured; I don't know the length of them tenders.

Q. You may resume the chair. (Witness resumes stand.) Mr. Schmidt, when you pulled forward with the light engine on the movement to go back on the passing-track and into the yards, you stated, I believe, that Skaggs rode on the rear of the tender?

A. You mean coming up the main line switch?

Q. When you were going up to the main line switch and before you started back with the light engine?

A. Yes, sir.

Q. Now, how far are you able to see from your position in the cab, as you explained the position in which you ride a while ago,

back along the track upon the left-hand side? Now, that question isn't well phrased, I will put it this way: How close may a light, like a brakeman's lantern, be to the rear end of the tender of that engine and standing between the tracks to the left side?

A. Not over forty feet.

Q. That is to say——

A. About forty feet.

Q. How would that compare with the carlength?

A. Well, about a carlength; a carlength anyway.

154 Q. About a carlength anyway. From the position that you occupy in taking signals there, as I understand you, at a distance of forty feet in the rear of the tender you could see across the track to the left-hand side?

A. Yes, sir.

Q. When you started forward you took the signal from the engineer's side from the head brakeman, when you started forward with the light engine?

A. Yes, sir.

Q. You took the signal from the head brakeman to stop at the switch?

A. Yes, sir.

Q. Then you stated a moment ago that you got a back-up signal?

A. Yes, sir.

Q. Looking back at that time, was there any other switchman's light in your view or not?

A. At what time you mean?

Q. At the time you started back this last movement with the light engine?

A. No, sir.

Q. How much time, if you can give us an idea, elapsed between your stop on the main line to the time that the accident occurred? Do you understand what I have reference to?

A. The time we come into town?

Q. No, no, I see I haven't made it definite. You have gone forward with your string of cars, you have moved back and set out two Dumbars, you have come forward again past the

155 switch and moved back upon the main line with your cut-off; you understand me now?

A. Yes, sir.

Q. Now then, you stopped with the cut-off; from the time you stopped with the cut-off how much time was consumed in what transpired to the time of the accident?

A. Well, just long enough for the brakeman to cut the engine off and move up the switch and return.

Q. Well, what is the fact as to whether there was any delay or not about that?

A. No, no delay at all.

Q. Are those operations quick operations or slow operations or what?

A. Well, just moving up and reversing the engine and backing up, with the brakeman throwing the switch.

Q. There is pulling the pin, moving ahead, stopping, throwing the switch and backing up?

A. Yes, sir.

Q. Were those movements done with the usual expedition, in the usual length of time as in ordinary work, or a longer time or a shorter time?

A. No, just was ordinary work.

Cross-examination.

By Mr. Barton:

Q. You say that was a very dark night?

A. Yes, sir.

Q. And cold also?

A. Yes, sir.

156 Q. I take it from what you have said that you only distinguished persons by the lanterns that they carried in that work that night at Amboy?

A. On a dark night, yes sir.

Q. Well, that particular night.

A. Yes, sir.

Q. You were only able to tell where the members of your crew were by seeing lanterns?

A. Well, by them working with the train, seeing where their lanterns were.

Q. Yes, seeing the lanterns is the only way you could tell that there was a man off from you because there was a light moving there; is that right?

A. Where do you mean off from me?

Q. Well, did you see any person around that yard at all that night that you knew?

A. I knew there were two brakemen working with this train.

Q. Yes, and you knew where they were because of the lights they carried?

A. Yes, sir.

Q. You didn't know where they were because you could see their bodies?

A. No sir, I couldn't see their bodies.

Q. No sir, so that you only knew that there were people moving about that yard that night because you saw lights moving about; ain't that right?

A. Yes, sir.

Q. And you didn't know whether it was Skaggs or Buchta or the conductor?

157 A. I knew Skaggs was working with the engine.

Q. Yes, so you assumed that the light nearest to your engine was that carried by Skaggs?

A. Yes, sir.

Q. And that is the only way you were able to determine that fact, ain't it?

A. Yes, sir.

Q. If Skaggs and Buchta had changed places you would not have been able to have told it because you couldn't see it?

A. Not unless a conversation came in.

Q. No, not unless a conversation came in. So you simply assumed that the light that was nearest to your engine was Skaggs' light?

A. Yes, sir.

Q. Not because you could see Skaggs' body and know that it was he, but because you assumed that it was his business to be nearest your engine and therefore the light nearest to your engine was Skaggs' light; ain't that right?

A. Yes, sir.

Q. And that was true of all this work that you have told us about here that night at Amboy, ain't it?

A. What do you mean?

Q. With reference to all the signals that you got there that night at Amboy and everything you have told us about here, so far as saying that the one was Buchta and the other was Skaggs, it is based upon what you have said, that you saw the lights and assumed that the light nearest your engine was Skaggs' light?

158 A. Yes, sir.

Q. When you say you saw a man on the tender or on a car, you mean you saw a light in position that it must have been held by some one on the car?

A. Yes, sir.

Q. Or on the tender; is that right?

A. Yes, sir.

Q. And when you would see a light go down from the car, as it were, to the ground, you took it for granted that the man jumped off with that light in his hand, ain't that right?

A. Yes, sir.

Q. Not because you saw the man jump, but because you saw the sudden movement of the lantern down?

A. Yes, sir.

Q. That is right, ain't it?

A. Yes, sir.

Q. Now, as to where your engine stood at any given time that you have been interrogated about here, your answer as to where you were is simply based upon a recollection and no certainty; it is simply your best impression about it, that is all I understand that you meant to say, ain't it?

A. I didn't get that.

Q. Have you any present recollection that your engine stood at any particular place when it stopped?

A. Well, only by the accident.

Q. Only by the accident; you know at the time of the accident that when you came to a stop you found it where? Where was your engine standing after the accident?

159 A. Well, I couldn't just explain that only by the chart, the width of the track there.

Q. Very well, and you explained that by saying that it stood in

a place where the passing-track and the main line track came so close together that the car was against the tender of your engine?

A. Yes, sir.

Q. Now, is there anything else that enables you to say where your engine was standing at the time it stopped after the accident than the fact that those tracks were so close together, as I have stated? Anything else that will explain where your engine was standing?

(No answer.)

Q. Perhaps I don't make myself clear. You can't tell how far you were from the main line switch connecting the passing track with the main track, can you?

A. No, I didn't pay any attention to it.

Q. No, nor you don't know how far you were from Division street—I mean when your engine stopped at the time of the accident.

(No answer.)

Q. Now, I am not trying to corner you at all, I simply wanted to know——

A. Standing right near the head end of these cars that we set out.

Q. Well, where were those cars?

A. They were on the main line.

Q. And where with reference to Division street?

A. Division street was south of there.

160 Q. Division street was south of those two cars; and how far south?

A. What two cars? I am talking about these two cars that we shoved on the main line, the cars we cornered.

Q. The cars you cornered; they were north of Division street, is that what you said, the cars you cornered were on the main line track and north of Division street?

A. Yes, sir.

Q. Now, how do you know that?

A. Well, naturally would expect they were.

Q. Well, why?

A. What?

Q. Why did you expect they were?

A. Because there was room enough in there to hold the cars.

Q. Hold how many cars?

A. Well, I wouldn't just say; it would hold nine or ten.

Q. How do you know that?

A. Why, by the distance.

Q. How far was it?

A. How far was what?

Q. The space that you say would hold nine or ten cars?

A. Judging by the distance from Division street to the north main line switch.

Q. Now, Mr. Schmidt, the fact is you don't know how far your engine was standing from Division street at the time of this accident; ain't that true?

161 A. No, I don't know how far north it was.

Q. You don't know whether there was a space of six cars

or the space of a dozen cars between your engine and Division street at the time of this accident, do you?

A. Why, yes, but it won't hold that many cars in there.

Q. It won't hold a dozen, you know that. Was there a space of six cars in there between your engine as it stood at the time of the accident and Division street, on the main line?

A. Yes, sir.

Q. Seven? Would it hold seven?

A. I wouldn't say how many more.

Q. Why do you say then it would hold six?

A. Because I know it would hold that many.

Q. Did you ever try it?

A. Yes sir, in pulling out.

Q. When?

A. When we were moving out of town.

Q. When?

A. Any time when you are pulling out of town with a freight train.

Q. Pulling out. Did you stop to see?

A. No, sir, but you can judge by it, seeing it in daylight.

Q. Then that is the source of your information as to the distance between your engine when it stopped at the time of this accident and Division street, that you have observed in going through there with trains that there was a space of six cars between the space where your engine stood at the time of this accident and Division
162 street; is that right?

A. I don't know where the rear end of this train was stopped; I wasn't back there.

Q. You didn't go back after this accident to Division street, at all, did you?

A. No, sir.

Q. And you didn't know how many cars your engine had hold of at the last pull that it made of cars on the main line track, did you?

A. No, sir.

Q. So that when your engine was cut off on the main line the last time, as to the number of cars that were cut off you knew nothing about it?

A. No sir, I wasn't told the number of cars.

Q. And it was so dark you couldn't tell from your engine either from looking back?

A. No, sir.

Q. You couldn't have counted four cars from your engine, could you, that night?

A. No, sir.

Q. Could you have counted two cars even from your engine that night?

A. No, sir.

Q. It looked like simply a streak of blackness from your engine away from the tender?

A. Yes, sir.

Q. Is that right?
A. Yes, sir.
Q. You couldn't tell where one car stopped and another one began, could you?
A. Not unless you was in the light.
163 Q. Well, without any light there that night excepting what was on your engine, of course looking back over your tender you couldn't tell whether you had one or a dozen cars from anything you could see at all?
A. You could tell you had more than one by the way they pulled.
Q. But I mean from looking you couldn't tell?
A. No, you couldn't, because a train of coal it is hard to distinguish how many you have got after you do get back that far, in daylight.
Q. I suppose so. Now, your engine was headed north?
A. Yes, sir.
Q. And in all this work remained so headed north?
A. Yes, sir.
Q. And the tender was therefore on the south end of your engine?
A. Yes, sir.
Q. That was a regular road engine with a square tender?
A. Yes, sir.
Q. And the tender is sometimes referred to as the tank part of your engine, is it?
A. The what?
Q. The tender of your engine is sometimes referred——
A. No, the tender is what we call where the coal and water is.
Q. Yes. It is sometimes called the tank part of your engine?
164 A. Not very often; called the tender.
Q. It holds the water and the coal: the bottom of it is the water, and the top part is the coal?
A. The bottom and part of the back.
Q. Yes, and it is just as high at the back end as it is at the front end?
A. Yes, sir.
Q. Is the cab of your engine any wider than the tender?
A. No, sir.
Q. And is the tender as high as the cab of your engine?
A. Very near.
Q. As high as the roof, is it?
A. No. Well, it is a circular roof.
Q. But the tender is flat on the top and square across?
A. Yes, sir. Well, you couldn't call it square, either, because having coal in there you can't know how it is.
Q. Well, then, as you sat in the cab of your engine looking backwards you couldn't see over the top of your tender at all, could you?
A. No, sir, I couldn't see over the top.
Q. You simply had to look along the sides of the tender?
A. You can look around the back of it: as I say, you can look around the top of it.

Q. I mean you would look around the side of the tender looking backwards?

A. Well, it is just like here, if you lean your body out of here you can see back of the tender, you can look over the top.

165 Q. That is what I am getting at; so that when you speak of seeing lights, etc., past your engine you didn't see them over the top of your tender, but along the side of the tender?

A. When did I say that, that I saw the lights over the top of the tender?

Q. I didn't say you did, I say when you speak of seeing lights back along your train or anything, you saw them from the side of your engine rather than over the top of your engine?

A. Yes, sir, from the side, around.

Q. Now, did you have the side windows of the cab of your engine open that night?

A. Yes, sir.

Q. There was two windows, that is, they are movable, on the side of the cab of your engine?

A. Yes, sir.

Q. And one at each end, ain't there, on each side?

A. One on each end?

Q. Yes, you can look through; as you sat on your seat, now.

A. Yes, there is one looking out ahead and one in back.

Q. The one in front, why, of course you can always see through there and see forward?

A. Yes.

Q. But the one at the rear you would only look out against the tender?

A. That is all.

166 Q. So in order to see backwards from your engine you had to lean out at the side of your cab window?

A. Yes, sir.

Q. While that wasn't true with reference to looking forward, you could look through the window in front and see ahead?

A. Well, we generally always stand up and lean our body out when we are moving ahead and look that way; we don't expect to take signals through that front window.

Q. Well, but you can if you want to; a very cold day you don't have those side windows open, do you?

A. Yes, sir, in switching service; don't have them where you are going along the road because you have your window ahead of you, but taking signals we look out of the side.

Q. You say the tender part of your engine is twenty-five to thirty feet long—didn't you?

A. It is fully that.

Q. And the tender is just about the width of an average car, ain't it?

A. Yes, sir.

Q. And Mr. Bryan here, the civil engineer, says the cars run from eight feet to nine and a half in width; is that your idea of about the width of a car?

A. Well, I never measured the width of a car.

Q. Well, the tender extends out over the rail on each side two feet or more, doesn't it?

A. Extends out as wide as a car does.

Adjourned until the morning of May 14, 1913.

167 Q. How many drivers, driving-wheels, were there on this engine?

A. Eight.

Q. And a pony truck in front?

A. Yes, sir.

Q. Under the pilot?

A. Yes, sir.

Q. Can you be any more certain than you were yesterday about the length of this tender, the tender of this particular engine. You said twenty-five to thirty feet or in that neighborhood.

A. Well, it is around twenty-five feet.

Q. The tender; is it about the length of the engine itself?

A. No, sir, the engine is longer.

Q. Is it not a fact, an engine of the size of this one is about sixty feet over all?

A. Yes, sir.

Q. Now, the pilot of this engine, was it entirely at the end of the boiler, or did it come partly over the end of the boiler?

A. Front end of the frame, front end of the engine.

Q. Was your seat entirely at the front end of the boiler or was it partly under the side of the end of the boiler?

A. It is on the rear end of the boiler.

Q. Well, entirely at the rear end?

A. Yes, sir.

168 Q. So that from the place where you would be sitting in your ordinary position in the cab of the engine, as engineer, you could see straight across the fireman's side?

A. Yes, sir.

Q. I suppose you would look, however, looking straight across, you would look close to the end of the boiler?

A. You would look where?

Q. You would be looking in a line close to the end of the boiler?

A. Looking right across.

Q. Yes, well, I mean, but, suppose this is the end of your boiler, your cab comes out and covers it over here and you are sitting here, when you are looking across the fireman's side you are looking very close to the end of the boiler?

A. No, sir.

Q. How close?

A. You are sitting right back here if you are sitting down.

Q. About two feet from the end of the boiler?

A. Yes, sir.

Q. And using the Court's desk here for illustrative purposes, suppose that is the boiler and your cab is here and you are sitting on that side, on the right-hand side, as you are facing there, the window

that you have referred to that you look out straight ahead is right here by the side of the boiler.

A. Not alongside of the boiler, it is a space about that far between the boiler and the cab.

Q. Well, if it isn't beside the boiler where is it?

A. Well, there is a space in between this boiler and——

169 Q. How much of a space?

A. Well, I should judge about that far (indicating).

Q. How wide is this window?

The COURT: Indicating——

WITNESS: Indicating a kind of a gangway so you can go out to the front end.

Mr. BRACELEN: State in feet, if you can, what you have indicated with your hand, how far, so we can get it in the record.

Mr. BARTON: Let me straighten it out, I am examining the witness anyway.

Q. You hold up your hands. Now then, the Court wants to know how much space you were representing by your hands when you held up your hands. I don't know how far you had them apart; how far did you have them apart?

The COURT: Indicate the distance from the window to the boiler you held up your hand how far?

WITNESS: Between a foot and a half and two feet.

Q. And the window itself you say is how wide?

A. What window you have reference to?

Q. The one you looked forward along the boiler on the engineer's side.

A. Well, that is in the little door, you mean, in the front of the cab?

Q. Yes.

A. Well, that is about a foot, I should judge.

Q. Now, how much space is there to the right of the little window and the door there in the cab of your engine?

170 A. Why, just the window frame and where it is attached to the side.

Q. Then this double window that you referred to yesterday is what is along the side of the cab of the engine?

A. Yes, sir.

Q. The engineer's seat is a box arrangement running along under that side window in the cab, is it not?

A. Yes, sir. Not running along under the window, it is near the back window.

Q. How long is that seat?

A. Well, it is just a small box about—well, just enough for a man to sit on.

Q. It is against the outside of the cab?

A. It is against the back end of the cab.

Q. Now, when you say against the back end of the cab you mean against the back end of the side of the cab or the back end proper of the cab?

A. The back end proper of the cab, which we call the back end is towards the rear of it.

Q. Well, there would be a corner in the cab, wouldn't there, at the right-hand side, and at the back end, we might call it the rear right-hand corner of the cab. You understand what I mean now? Do you understand what part of the cab I am referring to when I say the rear right-hand corner of the cab?

A. I think I do.

Q. That would be on the engineer's side and the end of the cab nearest to the tender of the engine?

171 A. Yes, sir.

Q. Now, where is this seat with reference to that corner?

A. Well, it is a little to the left, just right to the left of it, it is right in that corner.

Q. Is it attached to the rear end of the cab?

A. No, sir, it is a seat-box.

Q. Can you turn around on that seat and look back along the tender of the engine and turn your feet around so that they would come between the seat and the end of the cab?

A. No, sir.

Q. Can you turn your feet around to the front of that seat when you are looking forward along the boiler?

A. Yes, sir.

Q. So that the seat that you occupy has two sides that you can put your legs or feet on, one would be the front and the other would be the side looking towards the fireman?

A. Yes, sir.

Q. Now, the window at the rear of the cab of the engine on the engineer's side, is it the same size as the window at the front looking along the boiler?

A. No, it is a little larger.

Q. As you sit in the cab of your engine you ordinarily sit with your back towards the side, don't you?

A. No, sir.

Q. Well, you can't turn your body clean around and look

172 backwards, because your legs can't find any place, open space, to put in between the seat and the end, the rear end of the cab?

A. No, sir.

Q. When you are looking backwards you simply turin your shoulders and face around enough so that you can look back along the tender?

A. No, sir, you don't; you stand up.

Q. You stand up. Were you standing up the night of this accident?

A. Yes, sir.

Q. Were you standing up during all the time of the switching work that was being done there?

A. Yes, sir.

Q. Now, when you were standing up what way did you face?

A. Well, which way,—the direction I was going.

Q. Did you ever face with your face out from the side of the cab of your engine?

A. To the side?

Q. Yes.

A. Which direction do you mean?

Q. Well to the engineer's side.

A. Looking out the——

Q. Yes.

A. No, sir, I was watching for signals.

Q. Now, is it not a fact that whether you are sitting down or standing up when you have got to be looking to the rear and to the front, that you stand or sit with your back to this open side window and that you are not looking through the end windows, you lean back out so that you can look forward or backward by simply turning your head one way or the other?

173

A. No, sir, I don't lean back that way.

Q. How do you lean back, then?

A. I generally sit up on the arm rest.

Q. What do you mean by the arm rest?

A. The bottom part of the window sill.

Q. Yes, but you have said you didn't sit this night, you were standing, so we will not count the sitting business.

Mr. BRACKLEN: Standing, in the motion——

Q. Well, you have said you didn't sit this night, but that you were standing——

Mr. BRACKLEN: Now, just a moment.

Mr. BARTON: Well, if the Court please, I want counsel kept quiet when I am asking a question.

The COURT: I think the counsel should be permitted to go on with his questions without interruption, and the witness can explain himself if the counsel is misinterpreting his statement. Proceed.

Q. Now, am I right or wrong in that, just what I have said now?

A. Why, you stand one foot, and the other foot upon the window sill.

Q. Yes, but when I say in my question that you have said you were standing that night in these operations.

A. You do when you are going forward, yes, sir.

Q. Well, this night in question were you sitting down or were you standing during these operations you were going over?

174

A. Well, I had different positions in both movements.

Q. Well, do you mean now by different position——

A. Going ahead you would be standing up.

Q. And in your switching movements?

A. Generally sit this way, if this is the side of your cab you have got your full view of them outside.

Q. Then, whether you said it or whether I said it—but I shall claim you said it—why, it is a mistake to say you were sitting all the time during that night's work, or that you were standing, but that you were partly sitting and partly standing.

A. Not sitting on my seat-box.

Q. Well, I may sit on the table here or on a chair, but I am sitting, nevertheless; don't you so understand? Now, you say that in the backward motions you sat on the arm of your seat—perhaps that isn't just right—on the arm rest of your seat; isn't that right?

A. Arm rest of the window.

Question read.

A. That is not. I don't know whether you want to call it sitting down or not, but I had one foot on the floor and the other one just balanced up like I showed you here.

Q. And which way was your back?

A. My back was to the front of the engine.

Q. And your face to the rear?

A. Yes, sir.

175 Q. And were you looking through the rear window in the cab of your engine?

A. No, sir.

Q. Where were you looking?

A. Looking out the side.

Q. And how far out of the window were you leaning so to look backward?

A. Well, I would put in my whole body from here on up. (Indicating.)

Q. Well, now, your eyes?

A. My head was fully out.

Q. Your head was fully out?

A. Yes, sir.

Q. And how far would your eyes be out of the side window as you were looking to the rear?

A. Well, about a foot.

Q. About a foot. Now, that would bring both your shoulders entirely outside of the window, would it not?

A. Yes, sir.

Q. And bring your eyes about a foot out?

A. Yes, sir.

Q. And as so sitting or standing, whichever you call it, and looking to the rear, how far would your head be from the end of the tender nearest to you?

A. About four or five feet.

Q. Sure of that?

A. About that.

Q. Might it be more?

A. Couldn't very well be very much more.

Q. Could it be any less?

A. Not the position you was taking.

176 Q. Then from the point where you looked back along the side of the tender you were looking from a point 30 to 35 feet away from the rear end of the tender?

A. Yes, sir.

Q. And you have said that you looked alongside of the tender, didn't you?

A. Looking back, watching for a signal.

Q. Yes; am I right, you looked along the side of the tender?

A. Yes, sir.

Q. You said you couldn't look over the top of the tender?

A. No, sir.

Q. You said that the tender was as wide as the cab of your engine?

A. Yes, sir.

Q. You have said that the tender was as wide as a car?

A. Yes, sir.

Q. You have said that you could see the left hand rail 40 feet ahead of the tender of your engine, didn't you?

A. Not ahead of the——

The COURT: You mean back of the engine?

Mr. BARTON: Well, as he was backing, it would be ahead.

The COURT: Yes.

Q. You were in backward motion and you were looking forward along the side of your tender?

A. Yes, sir.

Q. And you said in that position and in that backward
177 motion you could see the left hand rail 40 feet ahead of the head end of your tender, didn't you?

A. The back end of the tender.

Q. Well, call it the back end of the tender, then.

A. About 40 or 50 feet, but I didn't say I could see the rail this evening. It was very dark.

Q. Well, I assumed that when counsel was asking you about what you could see this night that he meant to have you say that you could see the rail, because he said the rail.

Mr. BRACELEN: No, I didn't. If the Court please, I object to that statement by counsel; I distinctly said a white light. If there is any doubt about it, and it is important enough, to ask for the record—I distinctly said a white light.

Q. Now then, we will assume that this desk that the court reporter is writing on is the side of the tender of your engine, and we will assume that you have got your head out a foot so that your eyes come a foot to the side here 30 or 35 feet, whichever you and your counsel wants it; will you tell me how you could see 40 feet ahead off the distance of eight or nine feet to the left when the straight line 30 feet ahead would be just one foot 3" to the left? The straight line wouldn't bend.

A. I didn't say off the head end of the tender.

Q. Don't you see that it is physically impossible from the position you were in to see any object back of the tender of your engine
as far to the left or right as the opposite rail unless you go at
178 least six times the distance between your eyes and the side of the tender, which would mean, if that tender was 35 feet, a distance of six times 35 or 115 feet; do you understand that?

A. Six times 35 is more than 115.

Q. Yes, 210 feet, in place of 40; that you have to go before you could see as far to the left as the left hand rail.

A. I differ with you. In the positions we use, the various positions we are in at these times, why we can see distinctly.

Q. Was this track straight that you were moving south on at the time this accident happened?

A. Yes, sir.

Q. And you were on the east side of your engine on that track?

A. Yes, sir.

Q. And moving south when the tender of your engine came in contact with cars on a track, standing on the east side?

A. Standing on the main line the cars were.

Q. Well, they were on the east side, were they not?

A. Yes, sir.

Q. Now, will you explain to the court and jury, if your engine was so close to this main line track that it struck cars standing there, how you could see past those cars and your tender and see anything to the south, on the east side of the passing track?

Mr. BRACELEN: Now, that question is objected to as mis-
179 leading in form, as argumentative and incompetent.

Objection overruled.

Exception by defendant.

A. By the distance you was up to the switch you could see any object that was moving down there with a lantern, or light moving.

Q. There were cars upon the main track and cars on the passing-track, were there not?

A. The cars on the passing-track was way beyond the head end of these other cars.

Q. You understood what I said, didn't you? There were cars on the passing track, were there not?

A. The two we left in there, on, what we call the lead.

Q. Well now, counsel on the other side and I have been talking about cars on the passing track, we have said nothing about cars on the lead; now, you bring in the fact that those two cars were on the lead.

Mr. BRACELEN: Just a moment.

The COURT: Let the witness explain what he means by the lead.

Mr. BRACELEN: I want to put in the record, however, if the Court please, the objection to the gratuitous statement of counsel that I have not been talking about cars on the lead, because I have been, and the witness, so far as the testimony has gone, has explained that on direct examination.

Q. The Court says you may explain what you mean by cars on the lead.

180 A. Well, these two Dunbars we set out we shoved in down the passing track when we pulled up.

Q. Now, there we have got it again, dumped them in on the passing track; that is what I have always understood. Are you right?

A. Shoved them down towards this lead.

Q. On the passing track?

A. Yes, but projecting over on the lead.

Q. Well, were they on the lead or were they on the passing track?
A. Well, I wouldn't say positively; I know they was far enough back so they ought to have been around that switch.

The COURT: Will you explain what you mean by the lead? I don't fully understand that.
WITNESS: Well, it is the lead where the yards leads off from the passing track.
The COURT: You mean that portion of the track, the main track, where it enters the passing track and before it gets out so it is running practically straight, where it is on the incline; is that what you refer to as the lead?
WITNESS: Yes, sir, down towards the lead where they go over into the yards.
The COURT: As I understand it, the passing track at this point where the accident took place is straight?
WITNESS: Yes, sir.
The COURT: And the main track curves a little?
WITNESS: Yes, sir.
181 The COURT: And runs into the passing track, so that from that point on north the main track would be really an extension of the passing track?
WITNESS: Yes, sir.

Q. Well then, as I now understand you, you don't know what track those two cars were on at the time you were moving southward with your light engine, and this accident happened?
A. Why, they was down near—down around this lead switch.
Q. But you don't know which track they were on?
A. No, I do not know which track they was standing on.

The COURT: Mr. Barton, I would suggest that the witness indicate on the plat where in his opinion those two cars were.

Q. I will put this so that the writing is upside down to you. This is Ex. 4. Now, can you on Deft.'s Ex. 4 locate the two cars that you are referring to?
A. The cars were about in here some place (indicating).
Q. The witness is now pointing to the locality of the number 12.9.
A. I judge along in there.
Q. On what is marked "passing track"; am I right? Well, he pointed to the locality of the right hand "12.9," I will put it that way.
The COURT: About in here?
WITNESS: Yes, along in here; I couldn't see—I didn't get
182 down to see to take notice where these cars were placed, but judging by the——
The COURT: Now have him indicate the distance from the switch, and I think counsel should call the attention of the jury to the point indicated.
Q. Now, can you tell how far from this main line switch that connected the passing-track with the main track at the north of this

Amboy yard it was down to where these two cars were standing at the time of this accident?

A. How much farther back?

Q. No, how far; how far from this main line switch at the north down to the place where those two cars were standing at the time of this accident?

A. The cars were beyond that.

Q. You still don't understand.

The COURT: About the distance.

Q. How many feet is it?

A. Well, I couldn't say; I wasn't on the ground.

Q. Well, I suppose you would be able to tell distances as well on the engine as on the ground, couldn't you?

A. I can't see in the night time.

Q. Oh, so you couldn't tell the distance that night; is that what I understand?

A. No, sir, I couldn't tell the distance.

Q. Then how could you locate the two cars?

A. By judging the weight and the moving of the engine and the power she is working, then you can tell just where you are
183 at, and you can distinguish where you are getting these signals from the brakeman as a stop signal.

Q. In other words, as your engine was running along lightly there that night, with no cars attached to it, you could tell from the motion of your engine and the feel of your engine whether there were two cars a hundred feet or a thousand feet away; is that what I understand?

A. No, sir.

Q. Oh, then how do you mean that when you say you could tell how far those two cars were away from the feel of your engine?

A. When we put the cars there in the first——

Q. But you were now moving your engine south on this main line track or passing-track, and you have been asked how far at that time those two cars were away from you, and you have attempted to give it, and in asking why you gave it you said because you could tell from the feel of your engine. Now, will you explain that?

A. Just as I have explained, in moving up with the train in the first place, when we pulled up to set out the cars, in backing down, the signal I got was a stop signal, and I got it at about that place.

Q. Now, the fact is you couldn't see those two cars at all when you were moving south from that main line switch with your light engine; isn't that true?

A. Yes, sir, I didn't say I could see them.

The COURT: Now, what car was it that the plaintiff came in contact with when he was injured?

184 WITNESS: The head car on the main line.

Mr. BARTON: If the Court please, I am approaching that proposition now.

Q. I suppose you didn't see the cars on the main line, either, then?

A. No, sir.

Q. You didn't see them until after you got off of your engine, did you?

A. I knew I hit them, I knew they was there.

Q. Yes, but I mean so far as seeing is concerned, with your eyesight.

A. Not until I stopped.

Q. Didn't see them until after you stopped and got off your engine?

A. I wasn't off the engine when I saw them, until I got around, I saw them then, but I saw them——

Q. That is what I mean, when you got off your engine and walked back there, then you saw the cars; is that right?

A. Certainly, I saw the cars then.

Q. But up until you did get off of your engine and walked back along your tender you hadn't seen those cars, but you had, of course, felt them and knew they were there because your engine hit them?

A. I saw them when I stopped.

Q. But you didn't see them before you stopped at all?

A. No, sir.

Q. And you didn't know that they were there at all until your engine hit them?

185 A. I didn't know—I knew they was on the main line.

Q. But where on the main line?

A. Well, did not know just where they were on the main line; supposed to be in the clear.

Q. You didn't think that they weren't into clear, did you?

A. I didn't what?

Q. You didn't think at all that those cars wouldn't clear, did you?

A. No, sir. I didn't know that they would clear.

Q. You believed that they would clear, didn't you?

A. Well, they ought to have cleared.

Q. Now, when you stopped your engine on the main line track at this last movement southward with cars attached to your engine, you said that your engine—now, you said it in answer to counsel on the other side, and not to me,—that your engine stood about at the main line switch, didn't you?

A. When I shoved back down to the main line?

Q. Yes, with those cars.

A. No, sir.

Q. Very well. Then, where was your engine standing when it came to a stop at the time you moved south with cars attached to your engine the last time?

A. The engine was on the main line.

Q. Yes, certainly, that is what I say, and the cars were on the main line, too?

186 A. Yes, sir.

Q. Now, when you came to a stop just before your engine was cut off from those cars, where was your engine standing?

A. Well, along about by that frog in there.

Q. What frog do you mean?

A. Right along about in here some place.

Q. The witness is now pointing to the frog that has been referred to by the witnesses here made by the two tracks——

A. I didn't get down and measure.

Q. —that came together, to-wit, the main line and the passing tracks, and that I may call the jury's attention to that—(plat shown and explained to the jury).

WITNESS: What did I point along here, what was your statement on that? That was a while ago, when you located the two cars that we set out.

Q. Do you want to change it?

A. No, I thought you was getting at, as you said that, I showed the last movement I made, left the cars there.

Q. Is there anything you have said that you want to explain?

A. Nothing whatever.

Q. Now, you have pointed out that when your engine stopped in the last southward motion, with cars attached to it, it stood about the frog of the main line track and the passing track. I am afraid I have got to ask for that rule again today. (Juror hands Mr. Barton a rule): Now, as near as I can figure this, Mr. Bracelen, it is
187 just six inches from that switch down to that frog, that is, that is as near as we can figure it out from this map. I think, though, your engineer did give that measurement exactly.

Mr. BRACELEN: It is approximately six inches.

Q. Do you know how long the average car is?

A. About 40 feet.

Q. Were there any street lights at that division street crossing this night of the accident?

A. I wouldn't say; I don't think they was lit that night, if I am not mistaken.

Q. You experienced the fact that it was a very dark night?

A. Yes, sir.

Q. And if there had been a street light there I suppose it would have attracted your attention; a dark night a light is more prominent to one than it is a night it is not so dark, is the reason I make that statement, and you haven't any recollection of any light there; is that the idea?

A. I wouldn't say whether it was lit or whether it wasn't.

Q. But you have no recollection of it, or have you? Have you a recollection of whether there was a light there or not?

A. I said that I wouldn't say positively whether it was lit or not.

Q. Now, were there lights on the switchstands there that night?

A. Yes, sir.

Q. What kind of lights?

A. Switch lights.

188 Q. And just describe them, please.

A. To the main line they are green, and to the passing track they are red, to the yards they are yellow—yellow and green—green straight away to the lead, and running down any track in the yards they are turned yellow.

Q. Now, from what you have said, you don't know whether these

two cars were on the passing track or on the track that you refer to as the lead which connects the yard tracks with the passing track; I believe that is right, ain't it? You don't know which one of those two tracks they were on?

A. No, I do not know which one they was on.

Q. When you moved south off of the main track and on to either the passing track or the lead I suppose you were giving attention to those switches to see what the lights would indicate that the switches were right or wrong?

A. I was watching for a signal from Mr. Skaggs any time.

Q. But you have said you couldn't see Mr. Skaggs to tell him.

A. Well, I was watching for the man that was riding the rear end of the engine with the lantern.

Q. Did you get signals from more than one person when you moved south on the passing-track or the lead at the time those two cars were set out?

A. You mean when I had hold of the whole train?

Q. Yes.

A. Well, there was two lanterns around there doing the work.

189 Q. Where did you see them?

A. Well, along the rear end.

Q. The rear end of what?

A. Of the string of cars we had.

Q. Were they both on the same side of the string of cars?

A. Yes, sir, both on the right side.

Q. And were they both giving the same signal?

A. Well, they both give the stop signs.

Q. How many stop signs did they give?

A. Well, you are always watching for a signal at any time; just kept swinging the lantern; I don't know how many times you would say; it was a stop sign.

Q. Then when you moved north again did you see more than one signal given by lantern?

A. Well, I got a signal to go ahead.

Q. Well, but was that from one lantern or from two different lanterns?

A. I will not say whether both of them gave me a signal or just one.

Q. And did you see more than one lantern on the side of that string of cars as you pulled north after the two had been cut off?

A. No, sir, there was only one there.

Q. Did you see what had become of the other lantern?

A. Why, he stood right along down there and walked across the main line.

Q. That would be in an easterly direction, then?

A. Yes, sir.

190 Q. Did you see where it went to?

A. Why, he stood down there.

Q. How long did you continue to look at him?

A. Well, I just saw him standing down there, move up to the switch, and got a stop sign, and got a back-up signal and backed up.

Q. Now, when you were moving north pulling the cars that remained attached to your engine after the two had been cut off, which way were you facing?

A. Well, I was facing both ways.

Q. Facing both ways? Now, will you explain how you done that?

A. Just standing up in the window this way, and keep looking back and forth, and you are leaning on this window sill.

Q. Now, do you wish this jury to understand that you kept that lantern that was farthest from you in view all that time?

A. Well, was watching for a signal to stop at any time.

Q. And which one of the lanterns did you expect to get the signal from?

A. The head man.

Q. Well, then what was the occasion for your watching the other lantern?

A. Well, I wasn't watching him, but I could see him down there.

Q. But you did pay special attention to the other light also?

Mr. BRACELEN: Well, he hasn't said so, Mr. Barton.

191 Q. Well, did you?

A. Well, I was watching the signal from the head end, from the head man.

Q. Well, did you pay any attention at all to the other lantern?

A. Not at the time I was pulling ahead.

Q. Well, when did you give any attention to it?

A. When I was backing up after I went over the switch.

Q. Why were you giving attention to the second lantern after you went over the switch?

A. Well, it is natural, as long as they are standing in view you can see them both; I wasn't giving particular attention to it.

Q. After you got over the switch you say you were looking—or when you were going over the switch you were looking for a signal from the lantern nearest to your engine, and you got a stop signal from it, I believe you said?

A. Yes, sir.

Q. And the other lantern was still in your view, and it did not signal you to stop?

A. No, sir.

Q. But it was in your view?

A. Well, I could see it standing, yes.

Q. Certainly, certainly, and it continued to remain in your view, didn't it?

A. Yes, sir.

Q. Certainly, and it never went out of your sight so far as you observed, did it?

A. Not at that time.

Q. Did it at any time?

192 A. Which motion do you mean?

Q. At any time.

A. Well, would you allow me to make a statement of my own?
Q. Certainly.
A. I would like to describe that.

Mr. BRACELEN: Answer in your own way.
WITNESS: I got a signal from a man, from a lantern, to pull up beyond the switch, and the man jumped off at the switch and give me the stop signal, throwed the switch or turned it green to the main line, and give me a back-up signal. At the time backing up this man that was standing down below got on the cars as they reached him, and then I got a stop signal from the head end, and at the time saw the hind man jump off down there, and I couldn't see whether he gave a signal or not, and Mr. Skaggs cut the engine off and we pulled up to the switch, throwed the switch red for the passing-track, and he give me a back-up signal, got on to the engine at the rear of the tank, and when we got down to those cars, why, just previous to getting to those cars I see him disappear.
Q. How often have you told that story?
A. Which?
Q. Just what you said now?
A. How often have I told it?
Q. Yes. That is the second time you told it here in court, how often did you tell it out of court?
A. I didn't tell it out of court, only told the lawyer the other evening.
193 Q. How often did you tell the claim agent?
A. When I made the statement to him.
Q. You have gone over this so that it has got to be quite a story with you?
A. No, sir, that is the actual movements we made.
Q. But the reason you want to tell it in explanation is so that you can start in at the beginning and go right straight through as you have done it quite frequently?
A. Well, but you didn't ask me——
Q. In other words, it is a kind of a school boy's lesson to you, is it not, that you can't commence at the middle or at one end, but must start back where the lawyers and claim agent commenced, and then go right straight through without interruption, or else you will get into trouble?
A. No, sir.
Q. Where, now, was the lantern that was farthest from you when your engine came to a stop when it had been moving northward with no cars attached to it?
A. Where was my engine when we stopped?
Q. No, when you did come to a stop in that northward movement with your light engine, where was the second lantern, the one farthest from you?
A. I didn't see him.
Q. When you came to a stop moving northward off of the passing-track with those cars that remained attached to your
194 engine after cutting off the two, where was the second lantern, the one farthest from you?

A. He was down near the head end of these two cars, near there, because he was there at the time we cut off the two——

Q. Will you tell us how you can tell that, when you have repeatedly said you couldn't see this second car?

A. Why, you know where the men are doing the work.

Q. Well, if you couldn't see cars down there how can you see that a lantern was by those cars or near to them?

A. The both men were together when they were cutting these two cars off.

Q. How do you know that?

A. Because their lanterns were together.

Q. You could tell that by looking back a couple of hundred feet, you could tell two lights were together?

A. Yes, sir, supposed to be two men there with the two lanterns.

Q. Why supposed to be?

A. Well, because the two lanterns was there.

Q. How could you tell that the two lanterns were together?

A. Because they were standing along by each other there.

Q. Now, will you explain to the Court and jury how you could tell two lanterns were together on a night that was so dark that you couldn't see a car forty feet away from you when the two
195 lanterns were perhaps several hundred feet away from you?

A. Because you can see a light in a distance.

Q. But whether one light is nearer to you than the other how can you tell that?

A. Well, you can see whether the two lights are together or not.

Q. How?

A. By looking at them.

Q. That is, you can tell whether one was 200 feet and the other 210 feet from you, couldn't you? Do you mean that?

A. Why, you can see the both of them there working together.

Q. Well, very well. Now, these two men were both, according to your testimony, helping do that work that night?

A. Yes, sir.

Q. They both threw switches, didn't they?

Mr. BRACELEN: Well now, if the Court please, that is objected to as repetition and too general; that isn't going to help, there is no dispute in the testimony as to the two brakemen being on the train and a part of that crew and assisting in the work, and a general statement that they both threw switches or both did this or both did that can only confuse. I object to it as repetition and too general.

Objection overruled.

Exception by defendant.

A. I could just see one man throwing switches.

196 Q. Well, did you know who it was that was throwing the switches?

A. Supposed to have been the head man.

Q. Now, these maps all show switches along that passing-track

and that lead that you have referred to; do you know how many switches there were down there?

A. Yes, sir.

Q. When you moved south on the passing-track or off of the main line the first time with a string of cars attached to it, you have said that there were two men on that string of cars rode down there, one near your engine, the other near the rear end; am I right or wrong about that?

A. When we had the whole string of cars?

Q. Yes.

A. No, sir, I didn't say that he was riding on the engine when we was backing up the string.

Q. I didn't say he was riding on the engine, either, but there were two men on the string of cars?

A. They were on the right-hand side.

Q. Two men; that is, you saw two lanterns?

A. No, there was only one riding the engine back—or riding the train back.

Q. And what car was he on?

A. I don't know.

Q. Was he near the rear end or near the engine?

A. Near the rear end.

197 Q. Now then, you have said when you came to a stop that time you saw two lantern signals given; where were they?

A. One man was down near the crossing there some place.

Q. Well, where was the other one?

A. He was riding on the train.

Q. You have said you saw the one get off the end of the string of cars and walk across to the main track; didn't you mean that?

A. In a different movement.

Q. Well, what movement? You only went once down on the passing-track or the lead with the string of cars, didn't you?

A. Well, he didn't get off then.

Q. Well, when did he leave that place and go across to the main line?

A. After we cut these cars off.

Mr. BRACELEN: Exactly.

WITNESS: After these cars was cut off.

Q. Yes, and you only went south once with the string of cars, ain't that right? That is, I mean on the lead or on the passing-track.

A. Yes, we backed in with the string of cars.

Q. Well, you did see two men down there, however?

A. Yes, sir, saw two lanterns.

Q. And you expected that your engine would be cut off?

A. No, sir, I didn't expect that.

Q. But when you would go north you did?

A. I didn't know until I got the stop sign.

198 Q. Now, do you wish to be understood as saying that when you moved south on the passing or lead track with this

string of cars and two were cut off, that both of the brakemen were back at the rear end of that string of cars?

A. There was one of them at the rear end.

Q. And where was the other one?

A. Why, naturally supposed——

Q. Well, but so far as you know where was he?

A. He was down around the crossing.

Q. And when you pulled out, going north then with the cars that remained attached to your engine after cutting off two, where was the man nearest to your engine?

A. Down around the rear end.

Q. When and how did he get up to your engine to cut your engine off?

A. Well, we pulled on up.

Q. Yes?

A. He jumped off and throwed the switch, and then we backed down and he stayed along there on the ground until we got pretty well down, and then he caught the train and rode back a little ways.

Q. Now, you knew that there were switches to be thrown when you were setting out those two cars, didn't you?

A. I didn't know where they were going to set them.

Q. No, but didn't you know that in all railroad work at all similar to what you were doing there that night, that the two brakemen would have to take part in it, one to look after the switches,
199 the other to follow the engine, as it were, make the cuts near the engine; didn't you know that?

A. Yes, sir.

Q. So you do know that if those men done their work that night that they were both helping doing it?

A. They were both helping.

Q. Yes, throwing switches and making cuts, ain't that right?

A. Yes, sir, that is what they are supposed to do.

Q. Yes, supposed to do, and that they were both to help in the sense of accomplishing the work irrespective of just what they did? By that I mean, that if there was a switch to be thrown the man most convenient to it threw it, if there was a car to be cut the man closest to it would ordinarily cut, and if they were both together they would both help to do it; isn't that right?

A. Yes, sir.

Q. And so far as you know that it is the way the work was done there that night, isn't it?

A. Yes, sir.

Q. Did you know when you so started south with your light engine going off of the main track where you were going to or what you were going to do?

A. No, sir.

Q. You were simply obeying a signal to back up?

A. Obeying signals, yes, sir.

Q. Without any order given to you or any knowledge of the work to be done?

200 A. I did not know.

Q. Now, as I understand your testimony—and if I understand it I would like to have you correct me.—that at no time in any of this work which you have here told us about did you know from being able to see the man whether it was Buck or Skaggs that was giving signals or cutting off cars or cutting off your engine or throwing switches save and except that you knew that Skaggs was the head man and that you believed that he was nearest to your engine and that the light that you saw nearest to your engine you therefore took to be Skaggs' light; is that right or wrong?

A. Yes, sir, I took it to be Skaggs' light.

Q. And for the reasons that I have said that you couldn't see him but you believed that he was the man that was nearest to you?

A. And in other ways you will distinguish him after we have known the position they were in as to where their lanterns are.

Q. But so far as being able to see their body or their faces and therefore know who it was you couldn't do that that night because it was too dark?

A. Too dark.

Redirect examination.

By Mr. BRACELEN:

Q. Mr. Schmidt, counsel, a moment ago asked you about your story and about statement made by you in reference to this accident, and in answering counsel you spoke of your report——

201 Mr. BARTON: I don't recollect that.

Mr. BRACELEN: Yes, I think he did.

Q. I show you Def't's Ex. 11 and ask you to state to the Court and jury what that is.

A. That is a report of a personal injury.

Q. Made out by whom?

A. C. H. Schmidt—myself.

Q. Made out when?

A. January 13, 1913. I think I have got it. I can't see what date I have got, it has been punched out.

Q. I call your attention to the fact that there is a hole through that date, a "1" and a hole, and January; independently of the paper itself and the date it bears, what is your recollection, if you have any, as to how soon after the accident you made out this report?

A. Just as soon as I got home.

Q. And when was that? You mean as soon as you got home from that trip?

A. Yes, sir.

Q. On that run?

A. Well, we tied up in Amboy that night and got our rest, and then just as soon as I got home I made out that report.

Q. And why did you make out that report?

A. That is a rule and we have got to do it; we have got to make two of them.

Q. Regular instruction?
A. Yes, sir.

Mr. BRACELEN: Now, I don't think it is strictly competent
202 under the rules of evidence, but I would be glad to have it go in evidence if counsel cares to let the jury have it.

Q. Showing you Def't's Ex. 12, consisting of two typewritten sheets of paper, I will ask you to state what that exhibit is.
A. That is a statement made to the claim agent by himself.
Q. In regard to the circumstances of this accident?
A. Yes, sir, in regards to the injury of F. M. Craggs, freight brakeman.
Q. Of Mr. Scraggs. Calling your attention to the signature at the bottom of each page, state if you know whose signature that is.
A. My own.
Q. Was this signed by you on or about the date it bears, February 5, 1913?
A. Yes, sir.

Def't's Ex. 12 introduced in evidence without objection.

Q. Now, further in regard to the matter of your story and statements made by you, you have testified that you told me the facts before coming here to testify; when was that?
A. Monday evening.
Q. Of this week?
A. Yes, sir.
Q. Did you ever see me to talk to me before that time?
A. No, sir.

By Mr. BARTON:

203 Q. How often did you see this man sitting back here?
A. Before we come up here?
Q. Yes.
A. I saw him twice.
Q. How often have you seen him since he has been here?
A. Been sitting at the same place.
Q. Certainly. He is one of the claim agents, isn't he?
A. Yes.
Q. He has been kind of corralling you and the rest of the witnesses around there, hasn't he?
A. He has asked no questions regarding it since.

Mr. BRACELEN: The party of witnesses who are here are stopping at the Ryan hotel of this city, I believe?
WITNESS: Yes, sir.
Mr. BARTON: No doubt they are being well taken care of at the hotel; don't question the hotel a bit.

B. LICHTENBERGER, sworn on behalf of defendant, testified:

By Mr. BRACELEN:

Q. Mr. Lichtenberger, where do you live?
A. Freeport, Illinois.
Q. You are in the service of the defendant railroad?
A. Yes, sir.
Q. Have been for how long?
A. Nearly twenty-three years.
204 Q. In what capacity were you employed during the month of January of this year?
A. Freight conductor.
Q. How long have you been a freight conductor for the company?
A. Well, nearly twenty-one years.
Q. You were the conductor on the train in connection with which this accident occurred?
A. Yes, sir.
Q. Before you got to the station of Amboy on that run had you made any statement or not to the crew as to the work to be done at Amboy?
A. I told them that we were to set out these two Stockton loads—Dunbars they call them.
Q. Two cars, Stockton or Dunbar cars?
A. Yes, sir.
Q. Where was it that you had told the brakeman that?
A. That was at Mendota where we were eating lunch.
Q. Upon arrival at Amboy state what you did.
A. Well, on arrival at Amboy the train stopped, I went into the office with the rear brakeman, with Skaggs in there.
Q. Now, you speak of going into the office, and where is that office?
A. It is in the trainmen's room.
Q. At the station?
A. At the station, yes, sir.
Q. At the station at Amboy. And when you got there you say Skaggs was there. Now, what was said and done there in the
205 office at that time when all three of you, yourself, Buchta and Skaggs, were present?
A. Why, I asked the yardmaster where his through loads were.
Q. Where his what?
A. Through loads, that is, loads——
Q. Why did you ask that question?
A. Well, those were loads that would go to the end of our run.
Q. I see, and what did he say?
A. He told us on track 6.
Q. Now, Mr. Lichtenberger, what else was said there in the office?
A. And I told him that I had two Dunbar loads, and asked him which track he wanted those put on; he told me track 4.
Q. Now go right ahead. What then was said or done?
A. Well, I says to the boys, I says, "Now, we will cut off right where we stand on the main line," and we went out of the office,

I don't know which one of the boys cut the cars off, but I went right over to track 6 to take the numbers, I was going to fill out there with those through loads we was to pick up.

Q. Why did you go to take the numbers on track 6?

A. Well, you have to get the number of the cars in order to get way-bills to correspond with each car.

Q. What was to be done with those through loads on track 6?

206 A. They were to be picked up.

Q. Carried away with your train: is that the idea?

A. Yes, sir, and I told the boys we would put the Dunbars on track 4 and then come over again to track 6 with what we had hold of, and I went over and started to take the numbers, and I saw there was a Freeport load over there, it was a car we was to set out at Freeport——

Q. How could you tell that?

A. Why, it had a card on it, switching-card they call them.

Q. What is that card for?

A. That is for the switchman to switch cars by.

Q. That showed a Freeport car?

A. It showed a Freeport load, a car for Freeport.

Q. Where did you go, that is, to what point upon track 6?

A. The north end: that would be the head end of that track.

Q. Why did you go there?

A. Well, I said to start in there to take car numbers, and then I would go back along down as far as I would want to get; you see the cars were lined up there in order for trains to pick up cars.

Q. I see. As I understand it, then, the string on track 6 were the through loads that you were to get?

A. Yes, sir.

Q. So you went over to the head car of that string of through loads?

207 A. Yes, sir.

Q. And where was that head car on track 6, that is, how close?

A. Well, I didn't notice in particular, but it was down in on the track probably two or three car lengths clear of the lead.

Q. Two or three carlengths to clear the lead; that would be, as I understand it, two or three carlengths from switch No. 6 shown on Def't's Ex. 3?

A. That would be, oh, possibly two or three carlengths to the clearing point. What I mean by the clearing point would be down to clear the lead.

Q. I see. Now, when you got there and found this Freeport on the head end, what did you do? Just tell the jury.

A. Well, I walked up back towards where the boys were going to come in with those two Dunbars, and I hollered to the rear brakeman—I supposed it was he—I hollered "Buck," and he answered me, and I says, "Now, just set those Dunbars out there on the passing-track or towards the lead, and the balance back on the main line

and come in with your engine, for here is a Freeport car on the head end," and he said all right.

Q. Now, prior to the time that you discovered the Freeport on the head end on track 6 what were the instructions and what would have been the movements of the engine with those cars as you and the men then understood it?

A. Providing there would have been no change, you mean?

208 Q. Providing you hadn't discovered the Freeport on the head end.

A. Well, if we hadn't discovered the Freeport on the head end they would have shoved down in on track 4 and then would have cut the two Dunbars off and pulled ahead up over No. 4 switch and then they would have backed down in on track 6.

Q. And taken hold of the string of through loads on track 6?

A. Yes, sir.

Q. Now, when you found the Freeport you say you saw the light of the brakeman, and called "Buck?"

A. Yes, sir.

Q. I want to ask you to state just as accurately as you are able to where Buck was or where the light was that you afterwards found to be Buck when you called to him.

A. Well, apparently it was right in about Division street; I couldn't tell exactly, but just in particular, I didn't notice particularly, and I see the light and I hollered.

Q. Now, did you get any response?

A. Yes, he wanted to know what I wanted.

Q. Who answered?

A. Buchta.

Q. How long have you known Buchta?

A. Well, I have known Buchta for probably six years, in the neighborhood of that, five or six, I don't know exactly.

Q. He was one of your regular crew?

209 A. He was my regular hind brakeman.

Q. Mr. Skaggs was a new man on that run?

A. Yes, sir.

Q. I believe that was his first run with you?

A. Yes, sir.

Q. Now, Buchta answered. What did you tell him?

A. I told him instead of setting the cars—what I said to him, I says, "Don't shove down in with the Dunbars, just put them on the lead, and the balance back on the main line and then come in with your engine and shove your two Dunbars in on 4." That was to save handling them ten cars, you see, down in the yard so far; just put them into the clear of the main line or on the lead. And then he cut off his engine—or I told him to shove the cars down the main line and come in with the engine and pick these cars up on 6 after getting rid of the two Dunbars. Of course they knew they were to get rid of those.

Q. So to be clear, what would be the movement in order to make up this train as you wanted it made up and directed Buchta to make

it up after discovering the Freeport? Just go ahead, the light engine would come back and do what?

A. Well, the movement would be, after setting the cars on the main line, would be to come in—they would come in against those two that they had cut off, those two Dunbars——

Q. Yes?

A. —they would shove them down in on track 4, cut them off and go up over 4 switch, track 4 switch; that switch would
210 be thrown, then they would back down in on track 6, then cut off behind how many cars we wanted and pull out on the main line and shove down and couple up.

Q. Couple up your whole train?

A. Couple, back on down to the depot.

Q. And you would have your Freeport car where in your train?

A. Next to the engine.

Q. What did you then do after calling to Buchta and giving the instructions in the light of this Freeport car?

A. I went back down on track 6 and took the numbers of what cars that I wanted to pick up.

Q. When did you first know that something had gone wrong up ahead?

A. Well, the first I knew was when I had got just about the car numbers that I thought would make enough for the train, I had just started back and I heard the whistle blow.

Q. Well, that is the point I am getting at; was that the first warning to you that something had gone wrong?

A. Yes, sir.

Q. And at that time you didn't know what the matter was?

A. No, sir.

Q. Now, from the time that you called to Buck after discovering the Freeport and giving him his instructions, from that time until you heard the whistle of the engine what were you doing and where were you?

211 A. Taking car numbers.

Q. Where?

A. Track 6.

Q. After you talked to Buck and told him about the Freeport where did you go directly from that point?

A. Right directly down track 6.

Q. Now, after you heard the whistle—what was that signal, by the way?

A. Well, to call our attention to something.

Q. I mean how was the whistle sounded?

A. A few short blasts of the whistle.

Q. What does that mean?

A. Well, it is to call the attention of the crew there is something wrong.

Q. When you heard the whistle what did you do?

A. Well, I immediately went up that way.

Q. Go ahead.

A. I saw a torch light—I suppose a torch light, it was a light,

anyhow, I knew it wasn't a lantern,—and walked up that way. When I had got somewheres near Division street crossing I meets Buchta and he says, "Skaggs is hurt up there," or something to that effect, and I said—he says, "better go get the doctor." "Yes," I says, "hurry up and get the doctor, and go to the office, and as you go by the office," I says, "notify the switchman and the operator, and I will go up and see what the trouble is."

Q. What did you then do?

A. I immediately went up to the engine.

212 Q. And what did you find when you got to the engine?

A. I found Mr. Skaggs laying there on the ground back of the tank.

Q. Who was there?

A. The engineer.

Q. Anybody else?

A. The engineer, Mr. Skaggs and myself.

Q. And what did you observe as to the position of the head car on the main line, and the engine?

A. Well, I said to Mr. Skaggs, I says, "Where are you hurt?" He said "All over." I said, "How did this happen?" He says, "I cornered that car." And that is the first—I hadn't noticed the car until he spoke of it, and I looked up, and there the engine was jammed up against that car yet; they were wedged together, the corner of the tank and the car.

Q. And what car was this car that was cornered or wedged against the engine?

A. It was the head car, the head car of the cars that we set on the main line.

Q. Now, Mr. Lightenberger, to go back, how many cars composed your train when you pulled into Amboy that night?

A. Fifteen.

Q. Including the caboose?

A. Fourteen and the caboose.

Q. What, if you know, what cars, in number, were the two Dunbars that you were to set out?

A. That is, where they stand in the train?

213 Q. Yes, where they stand in the train.

A. They were the third and fourth car from the caboose.

Q. Third and fourth from the caboose; we have been counting the other way in the testimony so far; that would be——

A. Well, that would be—there was two tool cars next to the caboose, and those we cut off right ahead of those.

Q. You cut off right ahead of the two tool cars next to the caboose?

A. Next to the caboose.

Q. That is, the two Dunbars were 11 and 12 counting from the engine back?

A. Yes, sir.

Q. In your crew what position did Buchta hold? That is, what was his title, and what position Skaggs?

A. Buchta was a flagman, that is, the rear brakeman, and Skaggs the head, head brakeman.

Q. Now, in the regular movement of the whole train, say from one station to another, where are those two men supposed to be upon the train?

A. Well, Skaggs would be on the head end and Buchta on the rear end.

Q. One on the engine, the other on the caboose?

A. One on the engine, the other on the caboose.

Q. Do I understand, then, that it is a fact that the head brakeman rides on the engine?

A. Yes, sir.

214 Q. The Illinois Central Railroad Company, I suppose, like other companies, has books of rules for trainmen?

A. Yes, sir.

Q. And you are familiar with those rule-books, I take it?

A. Yes, sir.

Q. I call your attention to a book which purports to be rules and regulations of the transportation department of the Illinois Central Railroad Company, marked "Revised Edition, September 1, 1911." Calling your attention to page 99 of that book, rule 759, I will ask you to state whether or not, if you know, such a rule was in force and effect in the month and during the month of January, 1913.

A. Yes, sir, there was.

Mr. BRACELEN: I offer in evidence the rule in question.

Mr. BARTON: That is objected to as incompetent, irrelevant and immaterial. The plaintiff has testified he didn't have a rule-book, his attention has never been called to this rule. Unless he knew of this rule——

The COURT: I think it would be necessary to show Mr. Skaggs' knowledge of the rule.

Mr. BRACELEN: Well, your Honor, I think counsel has misunderstood the purpose of the offer. It is not to charge Mr. Skaggs with knowledge of the rule, as your Honor would discover upon reading the rule itself, but it is offered as bearing upon the proba-

215 bility of the truth of the testimony of the witnesses here.

Mr. BARTON: Well, the only witness that has been on the witness-stand that that rule could affect would be the plaintiff himself; his attention hasn't been called to it, and it doesn't appear that he ever knew about it.

Mr. BRACELEN: I still evidently haven't made myself clear.

The COURT: Do you understand what the rule is?

Mr. BARTON: No, I don't, but from your remarks I anticipate or think I have an idea about it. What number did you say?

Mr. BRACELEN: 759. The plaintiff has been fully cross-examined with reference to his position and Buchta's position upon the train in the movement of the cars back; now, this rule bears upon the——

Mr. BARTON: Well, Buchta hasn't been a witness yet.

Mr. BRACELEN: Doesn't matter whether he has been or not; it doesn't affect the competency of the offer, or the relevancy of the offer or the materiality of it, for that matter.

Mr. BARTON: I still insist upon my objection.

Objection sustained.

Exception by defendant.

Mr. BRACELEN: Now, the defendant offers in evidence rule 759 of the rule book, as follows: "Cars must not be backed nor cut loose and allowed to run over a street, railway or private crossing without a flagman on the front of or preceding the leading car. By night a white light must be displayed."

Mr. BARTON: That is objected to for the ground that it has not been called to the plaintiff's attention at all, that the plaintiff has already testified that he didn't have any rule-book, that for any other purpose than impeaching the plaintiff's testimony it would be a self-serving declaration of the defendant's own making, therefore incompetent, and the general objection that it is incompetent, irrelevant and immaterial.

Objection sustained

Exception by defendant.

Q. In this run from Clinton to Freeport, that is, on the trip in which the accident occurred, what happened in general, the movements and operations of the train at the different stations?

A. Which, coming north, that trip, you mean?

Q. Yes. I don't mean in detail, but so far as you recall what had you done at different stations?

A. Well, we had done work at various stations—Randolph, Bloomington, Minonk, La Salle and Mendota.

Q. Those are the stations between Clinton and Amboy?

A. Clinton and Amboy.

Q. Now, you say you had done work at different stations; what do you mean by that?

A. Setting out cars and picking up cars.

Q. And in that work of setting out cars and picking up cars at stations what had you observed Skaggs to be doing in that connection?

A. Well, he followed the engine around and cut off the engine, and the engine was to come in after cars, and cut off wherever we were to cut off, or hang on to the cars.

Q. Well, generally the work of a head brakeman?

A. Yes, the general work of a head brakeman.

Q. Now, how was it on the trip from Freeport to Clinton which Skaggs had made with you a day or two before?

A. Well, he was the head brakeman.

Q. And in respect to switching operations on that trip what if anything had you observed Skaggs to be doing?

A. Well, he would work—he would do just the same, if it was handling the engine, that is, what I mean, cutting off the engine, why, he was always on the head end.

Q. General work of a head brakeman, in other words?

A. Yes, sir.

Q. So far as your knowledge of him goes except as to this one trip from Freeport to Clinton and then from Clinton back as far as

Amboy, did you know anything prior to your observation of him on that trip, about his experience?

A. I never saw him before.

Q. He was a stranger to you?

A. Yes, sir.

218 Q. Now, in this work that was being done at Amboy—that is, I have reference now to the movements of the engine and cars there that you have detailed, setting out the Dunbars, picking up the through loads on track 6, backing and going forward about the switches; will you state to the Court and jury whether or not that work is ordinary and usual in its general nature in the work of brakemen on freight trains?

A. Yes, sir, that is their work. The conductor, when there is work to do that way, he tells them what to do, and they go and do the work.

Cross-examination.

By Mr. BARTON:

Q. You knew that Skaggs was a new man at the braking business, didn't you?

A. Well, yes, as far as I knew he was; he said——

Q. You knew that was his first trip as a brakeman?

A. No, I didn't know it was—the first trip with me.

Q. You knew it was the first trip with you, and you understood that he was just a new man at the business, didn't you?

A. No, I didn't.

Q. Well, why did you say a bit ago then that you knew he was a new man at the business?

Mr. BRACELEN: He didn't say that.

A. I didn't say I knew he was a new man.

Q. Well, what did you mean by saying he was a new man?

219 A. A new man on that division.

Q. You could see the way he did his work that he wasn't very familiar with it?

A. Oh, no, he done fairly well.

Q. What do you mean by fairly well?

A. Well, he seemed to understand anything you told him.

Q. You knew that was his first trip on that division?

A. No, I didn't know whether that was his first trip on that division; it was his first trip with me.

Q. You had been running over that division?

A. Yes, sir, I had.

Q. You knew he didn't know anything about the yards?

A. No, sir, I didn't.

Q. You didn't know that?

A. No, sir.

Q. Then you wish the Court and jury to understand so far as you know he may have been very familiar with the yards on that run?

A. As far as I know he might have been.

Q. And you treated him as though he was?
A. Yes. I instructed him that there was cars to set out there.
Q. Now, what instructions did you give him?
A. Just what I told him, that we would set the two Dunbars out and pick up the through loads.
Q. You told whom that?
A. Told the three of them: that is, the two of them, I should say, the two brakemen.
Q. Where were they when you told them?
220 A. In the office, trainmen's office,—trainmen's room, rather, I should say.
Q. Is that the first time you had ever said anything to them about it?
A. Told them at Mendota when we were going to lunch.
Q. Well, why did you repeat it?
A. Because the hind brakeman come in there then, I told him.
Q. At Mendota you told him?
A. Told the engineer and the brakeman—Skaggs.
Q. Where were you when you told them?
A. At the lunch counter.
Q. And what was it you said to them, now?
A. I told them we would get rid of those two Dunbars and pick up through loads?
Q. Is that all you said?
A. That is all I remember saying, yes, sir, that is all that was necessary.
Q. Well now, it may become very important as to what you said, so I want to get it. As you now give it, you said to the engineer and Skaggs at Mendota, do you say——
A. Yes, sir.
Q. At the lunch counter——
A. Yes, sir.
Q. —"We will get rid of those two Dunbars and pick up some loads?"
A. Through loads, yes, sir.
Q. Pick up through loads. Now, is that the language you used?
221 A. Well, as near as I can remember it was, yes.
Q. And is that all you said?
A. Well, that is all I remember saying, yes.
Q. Well now, we have got that here of record, and I want to be sure that it is right. "We will get rid of those two Dunbars?"
A. Well, or set out: that is what I meant: it was to set them out, when I said get rid of them.
Q. Well, do you want to make any other changes?
A. No, I don't want to make any changes, only my way of speaking of it is to get rid of it, that was my way of saying to set them out.
Q. Well, I said,——
A. No, I don't want to make any change.
Q. When had you spoken of those two Dunbars before that?
A. Not at any time.

Q. This is the first time, then, that you said anything to Skaggs or the engineer about the two Dunbars?

A. Yes, sir.

Q. Did you know that Skaggs knew anything about two Dunbars in that train?

A. He probably did; he might have seen the cards on them.

Q. Why do you say he probably did?

A. Because they have cards on, mark the station they go to.

Q. You have said that Skaggs was the head man?

A. Yes, sir.

222 Q. And that his work was at the head end, and you have said that those two Dunbars were at the rear end?

A. Yes, sir.

Q. Then why do you say now that Skaggs may have seen the tags on these Dunbars?

A. Why, he probably was back there.

Q. But you have said his place was at the head end.

A. It is.

Q. Yet you want this Court and jury now to think that Skaggs was at the rear end and looked at the tags on these cars and knew that there were two Dunbars at the rear end of your train, do you?

A. Well, what I mean is when we were on side-tracks waiting for trains the head brakeman sometimes comes back.

Q. This dark night when you couldn't see cars away from you any distance you still want the Court and jury to think that Skaggs may have seen tags on the rear end of his train and knew that there were two cars back there tagged "Dunbar," do you?

A. Oh, no, I don't say that he did know, but I was just saying that is the way he could have known it, by being back there.

Q. So you think when you told Skaggs at Mendota to set out two Dunbars that he knew where the two Dunbars were, do you?

Mr. BRACELEN: I object to the question as assuming a fact
223 not in evidence, as a clear misstatement of the testimony of the witness, clearly misleading and incompetent.

Objection overruled.

Exception by defendant.

Q. Do you so think that Skaggs knew where the two Dunbars were?

A. When I told him at Mendota?

Q. Yes.

A. Well, I didn't care then at Mendota whether he did or not.

Q. Oh, I see, you didn't care whether Skaggs knew where the two Dunbars were or not. You have spoken of tracks 4 and 6 at Amboy; do you know how many other tracks there were there?

A. There is eight tracks and the passing-track and the main line.

Q. Now, how do you know those tracks?

A. They are numbered.

Q. Where are the numbers?

A. Numbers on the switches, on the switch-stands.

Q. What kind of a number is it?

A. Starts in No. 1, 2, 3, 4, 5, 6 and 7.

Q. Well, take the number 1, the number itself; there was a number 1 on a switch; was it a white number or a dark number or large number or small number?

A. It was a white number.

Q. What part of the switchstand?

A. It is on the switchstand.

Q. How high from the ground?

A. Oh, I don't know how high, probably two feet and a
224 half, something like that, probably two feet; I never measured it, I don't know exactly.

Q. Painted on, was it?

A. Yes, sir.

Q. And how large would be the number?

A. Well, I don't know what size; it is quite a large number.

Q. Well, could you give us some idea of the height of the number in inches? Was it one inch, two inches, three inches or four inches, or how large?

A. Well, I would judge about eight inches.

Q. Now, which track was No. 1?

A. The track next to the passing-track.

Q. Now, all you said at Mendota was you would get rid of or set out, as you meant it, the two Dunbars, and that is all you said at that time?

A. That is all I remember saying, yes, sir.

Q. Now, when you got to Amboy you say that when you and the two brakement were in the office you then repeated that order in some way, I believe; is that right?

A. I asked the yardmaster where his through loads were, and he told me. I asked him where to set the Dunbars out—or I told him I had two to set out, and he told me where to put them.

Q. What did he say?

A. He told me to put them on track 4; I says, "All right, boys, come on, we'll go out."

Q. Now, how large an office was that?

A. Well, it is, I don't know, a little square building, a little square room there, probably 12x15, something similar to that.

225 Q. Now, when he said to set the Dunbars on track 4 you knew what track that was?

A. Yes sir.

Q. So did Buchta know what track it was, didn't he?

A. Yes, sir.

Q. That is, you knew without going to the switchstand, you were familiar enough with the yard to know just where track 4 was?

A. Yes; yes.

Q. Yes, certainly, you knew just how many tracks there were there and the names and numbers of each one, didn't you?

A. Yes, sir.

Q. And you knew that without going to the track to see the number or the name, didn't you?

A. Why, I could tell the track, yes.

Q. Well, Buchta was just as familiar with it as you were?

A. Well, probably not as well; he hadn't been working there as long as I had, no.

Q. And you expected that in the setting out of those two cars Buchta and Skaggs would do the work?

A. Yes, sir.

Q. Switches to be lined up and cuts to be made?

A. Yes, sir.

Q. And you expected that the two of them together would do it?

A. Yes, sir.

Q. And you gave no attention to it?

226 A. I was paying attention to getting numbers and waybills.

Q. Yes, you were paying no attention to cars in your train; that is, the train that you had when you come to Amboy, nor as to the detail of the work of setting out cars?

A. No. I had instructed the men what to set out and what we were going to pick up.

Q. You say you had instructed them what to set out?

A. Yes, sir.

Q. And the instructions you gave were those you have told us about?

A. Yes, sir.

Q. You gave them no other instructions?

A. I told them what track we were going to pick up off of.

Q. Well, what was it you told them?

A. I told them to set the two cars out on the main line, come down with the engine on track 6.

Q. Set the two cars out on track 4, go back on the main line and cut off the engine, and come in on track 6 light?

A. That wasn't the first instructions; the first was that we would go in on track 4 and then come in on track 6 with what cars we had hold of after setting out the Dunbars; and I finds this Freeport first out, then I went and told Buchta to put the balance of the cars down on the main line and come in with the engine.

Q. Now, whereabouts were you when you discovered the Freeport car which caused you to change the plan of your work down there?

227 A. Where is track 6? (Looking at plat.)

Q. Now, that will make the map right side up to you. These are supposed to be the numbers down here; here is 6 down there, that is switch 6. And here are the numbers of the tracks; there is No. 6 down there.

A. Well, this is 6?

Q. Yes.

A. I would be in here.

Q. You were then at the time you discovered the Freeport car on track 6 and some distance south of the switch to track 6, leading off of the lead on to track 6?

A. Yes, sir.

Q. About how far south of that switch 6 shown on Ex. 3 were you when you so discovered the Freeport car?

A. Well, I probably was six or seven carlengths from that switch.
Q. Six or seven carlengths south on track 6?
A. Track 6, from the switchstands; that would take me, then, probably two or three carlengths down in here, speaking from the switch, I would say four or five or six carlengths, in the neighborhood of that.
Q. Four or five or six carlengths south on the lead connecting with track 6?
A. Yes.

Recess until 2 p. m.

Q. We had, before the adjournment of court, located the place where you were when you discovered the Freeport car which
228 necessitated your changing the orders that you had previously given as to the work to be done at Amboy, and you so located yourself at a point on track No. 6 from four to six cars south of the switch connecting track 6 with the lead, and as I understood your testimony you were traveling southward on track 6, and that this Freeport car was the first car that you came to; is that right?
A. Yes, sir.
Q. Now, you had come from the depot, I take it, to that point—or not?
A. Yes, sir.
Q. That is right, is it? When you left the depot what direction did you proceed first?
A. Northwestward.
Q. And were you alone or some one with you?
A. I and the two brakemen went out of the office together, and then I left them and went over to track 6.
Q. Where did you separate from them?
A. On the depot platform.
Q. They remained there and you walked on, or how?
A. Well, I don't know which one—I didn't pay no more attention, but one of the two cut off behind these two Dunbars.
Q. Well, now, I am not asking about that. You came out, all three of you, you say, came out of the depot office about the same time; is that right?
A. Yes, sir.
Q. And on the platform, why, you left them?
229 A. Yes, sir.
Q. And as to which way they went or whether they went together or not you didn't observe; is that the fact?
A. No, sir, I didn't notice the men at all.
Q. So you simply walked off from them, and as to whether they remained standing still or whether they started off at the same time or not you can't tell us?
A. No, I don't know just how they went, but they——
Q. Well, that is all I want to know. And you continued then walking in a northwest—did you say—direction?
A. Well, but before, of course, I had to get around these curves on the main line first.

Q. Oh, I see.

A. You see I stepped up on the caboose steps, on the front end of the caboose, and got over on the west side track in order to get over to track 6. You see the train stood right near the depot, and I just stepped up on the caboose steps and platform and stepped across over on the west side.

Q. Why couldn't you have gone around the caboose?

A. Well, I just had a carlength to walk that way.

Q. So you crossed the main track then, by the use of the steps on the front end of the caboose, and when you got so across the main line, then what direction did you take?

A. Northwestward.

230 Q. Walking between the tracks or across the tracks, or how?

A. Well, I walked up a ways and then I crossed over across the tracks.

Q. You walked north and west between the main line and the passing-track that would be, I suppose?

A. Well, not over two or three car lengths at the outside.

Q. Then you crossed to your left, as it were?

A. Crossed on over to the left.

Q. Across the first or passing-track, and then tracks——

A. 1, 2, 3, 4, and so on.

Q. Continuing in a northwesterly direction?

A. Yes, sir.

Q. Until you came to track 6?

A. Yes, sir.

Q. Now, when you got to track 6—or you arrived at track 6 north of this Freeport car?

A. How is that?

Q. You arrived at track 6 at a point north of the Freeport car?

A. Yes, sir.

Q. How far from the Freeport car?

A. Oh, I don't know exactly, I didn't pay particular attention, but I knew I was north of it, and I walked over——

Q. How did you know when you got on track 6?

A. By the switchstand; I was north of the switch.

Q. Well, did you go to the switchstand?

231 A. I came down by it, yes, sir.

Q. Oh, then you had been far enough north——

A. I got farther north than that switch.

Q. I see, you had gotten far enough north so that when you started south you had to pass the switch stand that connected the lead track with track 6?

A. Yes, sir.

Q. And did you notice the number on the switch stand, or did you know it without that?

A. Well, I noticed the stand, yes, noticed the number on the stand.

Q. So then you passed by switch 6 in a southerly direction?

A. Yes, sir.

Q. And noticed that it was switch 6 and proceeded then south along track 6?

A. Yes, sir.

Q. Is that right, until you came to the Freeport car?

A. The head car.

Q. Which you have located four to six cars south of that switch stand?

A. Yes, sir.

Q. So you had to walk a distance of from four to six cars south to get to the Freeport car?

A. Yes, I would judge right in the neighborhood of that.

Q. Now, how did it happen that you had walked so far south and had to retrace your steps?

A. Well, I just happened to get that far up in walking around the end of cars through these other tracks, some had cars on and some didn't, and where there was a space, why I would walk around it to save crawling through between.

232

Q. So that on these 1 to 6 there were other cars?

A. Yes, sir.

Q. So this wasn't a clear yard to look through?

A. No, sir.

Q. Were there cars on all of those tracks?

A. Well, I don't know whether there was or not.

Q. But there were so many cars that in your walking through it in a northwesterly direction from the depot it brought you out at a place north of track 6?

A. Yes, sir.

Q. Of switch 6, I should say.

A. Switch 6, yes, the north end.

Q. Now, how far north of that switch; in other words, how far did you have to walk south until you got to switch 6?

A. Oh, I don't just remember the distance particularly.

Q. Well, were you as far north as switch 5?

A. Well I don't just remember exactly where I was. I knew when I come to the switch because that is the track the cars were on, I was paying attention to that one.

Q. And you know you were walking in a southerly direction when you came to switch 6?

A. When I came to the lead; that is, of course I went in a southerly direction, that put me down to track 6.

233

Q. Well, the lead there runs in a general direction——

A. Southward.

Q. So when you got to the lead you proceeded to walk along the lead in a southerly direction?

A. Yes, sir.

Q. Until you came to switch 6?

A. Yes, sir.

Q. And there you left it for track 6?

A. Yes, sir.

Q. And then walked from 4 to 6 miles until you came to the Freeport car?

A. Not miles—car lengths.

Q. I should say car lengths. Now, when you so came to the lead at some point north of switch 6 where was your engine?

A. Well, it was up north of me somewheres; I heard the exhaust, and they went up the main line, and I don't know just where they were. They were up north of me somewhere.

Q. Do you know what track they were on?

A. No, sir. They went up the main track, I know that, but——

Q. How do you know that?

A. Why, they had to go up the main track in order to get over into the yard.

Q. Well, but had they started out at all yet? That is, I mean, now, do you know it from having observed it and recollecting it as to whether when you came to the lead track your engine was moving or standing still?

234 A. Well, the only way I would have to know that that engine moved would be by the exhaust.

Q. Well, do you have a distinct recollection that you heard the exhaust of the engine at the time you came to the lead track?

A. Well, I don't just remember of what time I heard them, but I knew they were up there and I heard the exhaust of the engine, but I don't remember just exactly where I was at the time.

Q. Well, that is all we want; we want to know just what you know.

A. Well, I am trying to tell you just what I know.

Q. That's all right. So that as to whether your engine was moving or standing still at the time you reached the lead you haven't any present recollection?

A. No, sir, at the time I reached the lead I couldn't say whether the engine was moving or standing.

Q. You do have a recollection that at times at least you observed that its exhaust was working there?

A. Yes, sir.

Q. But whether it was at that time, or before or afterwards, you can't say?

A. No, sir, I couldn't say exactly what time that was.

Q. Now, in your trip through the yard from the station in that northwesterly direction to the lead I suppose the same thing is true, that you don't—that is, you haven't any recollection now of noticing w[illegible] train had started, and if so, where it was, or not?

235 A. N[illegible]

Q. No another thing in that connection: Do you recollect, Mr. Lichtenberger, whether there were any cars on the passing-track opposite the station or along about the station?

A. No, sir, I wouldn't say; I don't remember whether there were cars on that track or not.

Q. Speaking of the switch on the lead, and that we may again refresh our recollections about what the lead is as shown by these drawings, the lead track there was the most westerly of the tracks from the passing-track south?

A. Yes, sir.

Q. In other words, it started at the north from the passing-track?

A. Yes, sir.

Q. It didn't connect directly with the main track at all?

A. No, sir.

Q. But did connect with the passing-track?

A. Connected with the passing-track.

Q. And then run in a southerly direction, being the most westerly?

A. Down around the outside edge of the yard.

Q. And these seven tracks between it and the passing-track were each and all connected by switches with the lead?

Q. Yes.

Q. And not with the passing-track nor main track, either?

A. No, sir.

236 Q. As an ordinary thing and the usual rule, switches such as those connecting tracks 1 to 7, inclusive, with the lead are kept lined up for the lead?

A. Ordinarily, yes.

Q. That is what I say, as an ordinary rule; of course, when you are using them they have to be open.

A. Of course, any man using the switch, if he would go in on a track and come out, he wouldn't pay any attention to that switch, he wouldn't throw it back for the lead, he would leave that for the next man that wants to use that switch; them switches, it is immaterial how them switches is lined, such switches to a lead, you understand.

Q. Well, then I don't see where the rule comes in; my impression was just the opposite of that, Mr. Lichtenberg, that the man who goes in there now, he has to open the switch to go in, he has a right to leave it open until he comes out, but when he is through with that track then he throws the switch.

A. To the passing-track, yes.

Q. On the lead, too?

A. No, not on the lead.

Q. He can go in there and do his work and go out and leave the yard and leave that switch open?

A. That is, the inside switches outside of the one leading from the passing track, but that one must be lined up for the passing-track.

237 Q. So that going in there with your engine, or engine and cars, on that lead you would have to expect to have the switches in any shape, either open or closed; on the lead, I mean.

A. On the lead, yes, sir.

Q. But as to the passing-track, that you would expect to find lined up for the passing-track?

A. Yes, sir.

Q. In other words, that if you were going to go south from the main line at the north end of this Amboy yard you would find the

switch closed for that passing-track at the lead, and if you were going on the lead some person would have to be there and throw it?

A. You would have to—yes, sir, in case that it wasn't right. If you want to go on down the lead, why, if No. 2 switch would be wrong, why, it would have to be thrown in order to get on down the lead.

Q. Now, when you so reached the lead and went along it to switch 6 and then along track 6 until you came to the Freeport car, you knew as soon as you saw the car was marked for Freeport that you had to change your orders as to the work to be done there?

A. Yes, sir.

Q. And you proceeded to do that by calling to Buchta?

A. I walked back northward a ways.

Q. Very well. Now, just what you did is what we are wanting to get. The first thing you did, then, was to turn around and walk north again?

A. Yes, sir.

Q. And which direction did you go?

238 A. Northward direction.

Q. Along what track?

A. Track 6.

Q. You simply retraced your steps northward?

A. Yes, sir.

Q. How far did you go?

A. I went up then probably six or eight car-lengths.

Q. Well, did you go up to the lead, did you follow the track?

A. Yes, I come up as far as the lead.

Q. Did you go along the lead any distance?

A. Oh, well. I might have got a little above there. I didn't notice particularly, but somewheres up where I could make him hear me, and when I hollered to him he answered me.

Q. Now then, when did you first see Buchta after you discovered the Freeport car?

A. Right in around about Division street crossing.

Q. Well, as soon as you saw the Freeport car did you then look and see where Buchta was?

A. I turned around and looked back to see if I could see him.

Q. Did you see him?

A. No, sir.

Q. So that when you were at the Freeport car you didn't then see where Buchta was?

A. No, sir.

Q. And that, then, I suppose, accounted for the fact that you started and walked north so that you could see some person?

239 A. Yes, sir.

Q. And when did you then first see Buchta's light?

A. Well, I don't remember in particular, but I got up around about the switch there somewheres, possibly a little north of it.

Q. Then you saw his light, and as I recall it you said it was up to about Division street?

A. His light, yes, sir.

Q. And where with reference to the lead? That is, you were at the lead, but what I want to get at is was Buchta's light at or near the lead?

A. Yes, in right around about the lead.

Q. And when you got up there on the lead then, and as soon as you saw Buchta's light, did you stop or did you continue on?

A. Yes, sir, I stopped.

Q. And then you called to him?

A. Yes, sir.

Q. And did he answer you?

A. Yes, sir.

Q. Then did he come towards you?

A. No, sir, I couldn't tell if he did; the movement of the lantern didn't show that he was moving.

Q. Well, at that time I suppose you and he weren't far apart?

A. Well, we wasn't a great ways apart, no.

Q. Could you give us some idea?

A. Oh, well, probably six or eight carlengths, probably further.

Q. You hadn't any trouble in hearing him or making him hear you?

240 A. No, sir, he heard me.

Q. Didn't have to holler, I suppose, either?

A. Oh, I hollered, yes; I didn't holler as loud as I can holler, but I hollered and he answered me, and I knew by the tone of voice he could understand what I say, and I told him what I wanted.

Q. Now, at that time when you so saw Buchta and hollered to him did you notice where your engine was?

A. No, sir.

Q. Did you see any other light than that of Buchta's?

A. No, sir.

Q. I suppose you simply assumed that it was Buchta's because he was the rear man?

A. I supposed it was, and it sounded like his voice when he answered.

Q. Oh, yes, you also concluded partly from his voice, but you didn't notice where your engine was and you didn't see anything of your other brakeman?

A. No, sir.

Q. And I suppose the fact that you didn't notice where your engine was means also that you didn't notice whether it was moving or standing still?

A. No, sir.

Q. Now, will you tell us again just as near as you can, Mr. Lichtenberger, what was it you said to Buchta at that time when you called to him?

A. I told him instead of shoving the Dunbars down in on 4, just cut them off up there, up in the north end on the passing-
241 track or lead, whichever where they could get them stopped, and set the balance of the cars down on the main line and come in with the engine, that I had found a Freeport car on the

head end of 6. That is just about as near as I can get at it, the way I told him.

Q. Now, take the cutting off of the two Dunbar cars, did you say anything more than to cut off the two Dunbar cars?

A. I told him to put the balance down the main line, the balance of the train.

Q. Well, was that, now, what you said, "Cut off the two Dunbar cars, put the balance of them on the main track?"

A. Yes, sir.

Q. Is that, now, as near as you can tell——

A. Yes, sir.

Q. —as to what track they were to cut them off on. I suppose you took it for granted that they were on the passing-track?

A. Which, the cars put on the main line?

Q. Yes.

A. Oh, no, they would be cut off on the main line; I told him to put the balance out on the main line.

Q. Oh, your order was to cut off the two Dunbars and put the balance on the main line?

A. Yes, sir.

Q. Come down on No. 6, is that it?

A. Well, he would have to come on to the two Dunbars first, you know, and shove them in on track 4.

242 Q. But how did you make that known to him?

A. Well, he knew that is where they were going to be put in the first place; that is where he would have went with those if I hadn't said anything; he knew those two belonged on track 4 without being told that.

Q. Well now, your engine with all the cars that had been cut off on the main line was on the passing-track or on track 4, which, when you left the station?

A. Main line.

Q. Oh, they were all on the main line at that time?

A. No, sir.

Q. And as to when they left, that is, as to the point of time in your work, as to when they left the main line you don't know?

A. No, sir.

Q. And you didn't know at the time you called to Buchta as to whether they had left the main line or not?

A. No, sir.

Q. So that in the execution of your orders, so far as you know, nothing had been done with reference to the first order when you gave the second order?

A. Well, I was satisfied that they had moved up the main line, but I didn't know how far up they had got or anything like that.

Q. How were you satisfied?

A. By the exhaust of the engine I knew, and I could hear them, that is, I could hear the exhaust of the engine, that would

243 be the only way I could know, I couldn't see them.

Q. You couldn't see them for several reasons, I suppose, because of the darkness and because of other cars in the yards?

A. Oh, yes, of course; in fact, I never looked around, you know, I was heading for track 6 myself.

Q. And then after you gave that order to Buchta by so calling to him you turned around again and started in a southerly direction?

A. Yes, sir.

Q. You paid no more attention to the question of their movements?

A. No, sir.

Q. Nor to the movements of your engine?

A. Not a bit.

Q. And you proceeded, I suppose, right back the way you had come, north along the lead to track 6?

A. Yes, sir.

Q. And then past the Freeport car?

A. Took the number of it first.

Q. Took the number of it, and you had a book or a card on which you wrote?

A. A book.

Q. And when you came alongside of the Freeport car you wrote down its initials and the number and its destination?

A. No, sir, initial and number.

Q. Just the initial and number. Then you walked to the next car?

244 A. Yes, sir.

Q. And was the next car coupled to the Freeport car?

A. I don't remember whether it was coupled on or not; I should judge it was. We didn't go in there after the car afterwards, as I was going to say.

Q. And then when you came to the next car you did the same thing about it, took the initials and number?

A. Yes, sir.

Q. Wrote it down in your book?

A. Yes, sir.

Q. And continued walking along that way?

A. Yes, sir.

Q. Taking the numbers and initials of each car that you came to?

A. Yes, sir.

Q. Until, you say, you got as many cars as you wanted to make up your train?

A. Yes, sir, which I thought would make the tonnage.

Q. And do you know how many cars you did so take?

A. No, sir.

Q. That is, I mean you so wrote down in your book?

A. No, sir, I don't know how many it took, because I didn't get the bills.

Q. Well now, you had twelve cars; that is, you had fifteen cars when you arrived at Amboy, and you were setting out two
245 of those, and that left you thirteen cars; now, you were going to pick up enough more cars to make a complete train?

A. Yes, sir.

Q. How many cars would make up a complete train ordinarily?

A. Well, that would depend upon the cars; some cars run seventy tons and some run forty tons; that is gross tonnage.

Q. You were going along getting the numbers and initials of enough cars——

A. Yes, sir, when I got my way-bills I would check up the tonnage.

Q. How many cars did you take?

A. I didn't take any.

Q. I mean how many did you put down in your book.

A. I don't remember.

Q. Well, ordinarily how many cars would you expect to get to make up a train?

A. Oh, well, sometimes it takes forty loads, and sometimes you can get a train in thirty loads.

Q. So that you may have taken the number of fifteen——

A. Possibly fifteen or twenty cars, in the neighborhood of that.

Q. That is, that you may have taken the numbers or probably did take the numbers of fifteen, twenty cars?

A. Yes, sir.

Q. Now then, after getting the initials and numbers of those cars, then, as I take it, you had to go and did go to the depot office for the purpose of getting the way-bills?

246 A. No, sir; I heard that whistle blow.

Q. Well now then, where were you when you heard that whistle blow?

A. Well, right down at about the end of where I quit taking the number and initials of these cars, right down on track 6.

Q. Well, how far had you gotten along track 6 when you heard that whistle?

A. Well, from the head end of that string possibly fifteen to eighteen cars, I don't just remember.

Q. So that you had at the time you heard the whistle taken fifteen to twenty cars?

A. Yes, sir, right in the neighborhood of that.

Q. And that twenty cars, with forty feet to the car, would be 800 feet, then, that that would take you down along track 6 from the point where the Freeport car was?

A. Yes; yes, probably that far.

Q. That would bring you a good ways south of the depot?

A. Well, let's see, I don't know just exactly how far that would be.

Q. Well, according to this map it would have to.

A. It would be south of the depot, I should judge, yes.

Q. According to this map on here there would only be about room for—well, about a hundred feet of clearance north of the depot, which would mean two and a half cars, so that you would have to be way south of the depot if you went down fifteen

247 or twenty cars. Very well. We have it, then, that from the time you left the depot up to the time of this accident you had seen but one of your brakemen, and that was the man that you took to be Buchta and he was at or near Division street and on or near the lead track?

A. Yes, sir.

Q. And that that was just during the brief period of time that you gave him the order?
A. Yes, sir.
Q. You called to him as soon as you saw him?
A. Yes, sir.
Q. And as soon as you were through with giving him the order you turned around and went in the opposite direction?
A. Yes, went down there attending to my work taking the numbers and initials of these cars.
Q. And the probabilities are that didn't consume more than half a minute's time?
A. Half a minute? Oh, no, that would take you at least, I should judge——
Q. Ten or fifteen seconds, probably?
A. Oh, no, I ain't quite that speedy; from three to five minutes, I should judge, taking the numbers——
Q. No, you didn't understand me. I mean the period of time through which you were talking to Buchta was but a few seconds.
A. Oh, I thought you meant taking the numbers of these cars.
Q. No, I was getting at the fact that you only saw Buchta
248 for a very short period of time, just while you were talking to him.
A. Yes. Of course, I couldn't see the man, I could see his light.
Q. You saw the light, what you thought was Buchta's light?
A. Yes, sir.
Q. And you thought it was his light because you could hear his voice?
A. By his voice; I tell him by his voice, is all.

CHARLES BUCHTA, sworn on behalf of defendant, testified:

By Mr. BRACELEN:

Q. Where do you live, Mr. Buchta?
A. I live in Freeport, Illinois.
Q. How long have you lived at Freeport?
A. I lived at Freeport about seven years and a half.
Q. That is, I take it that is your place of residence?
A. Yes, sir.
Q. Your family lives there?
A. Yes, sir.
Q. About seven years and a half you have lived there?
A. Yes, sir.
Q. You are in the employ of the Illinois Central road?
A. Yes, sir.
Q. Have been for how long?
A. I have been about—just I moved there when I—about seven years and a half.
249 Q. That is when you moved to Freeport?
A. Yes, sir.
Q. And you started in the employ of this road?
A. Yes, sir.

Q. Had you been railroading before that time or not?
A. Yes, sir.
Q. Where had you lived?
A. I lived in Jefferson, Wisconsin; that is, before I was married.
Q. Oh, that is before you were married?
A. Yes, sir.
Q. And were you a railroad man at Jefferson?
A. Yes, sir.
Q. Now, during the seven years and a half that you have been employed by the Illinois Central what has been the nature of your employment?
A. As a brakeman.
Q. And were you so employed during the month of January of this year?
A. Yes, sir.
Q. And your run was from Clinton to Freeport and back?
A. Yes, sir.
Q. During that month?
A. Yes, sir.
Q. Now, during the seven years and a half that you have lived at Freeport have you had different runs or has your work been over a certain portion of the line?
A. Oh, I have had different runs.
250 Q. To what extent have you had this run from Freeport to Clinton and back?
A. Well, I have been on this run about two years, I guess.
Q. You were on the train in connection with the movements of which at Amboy the plaintiff was hurt?
A. Yes, sir.
Q. And you were the rear brakeman of that crew?
A. Yes, sir.
Q. Before you arrived at Amboy that night had you learned anything as to the work that was to be done there?
A. Well, we always, the conductor, you know, and the brakemen coming along the line, you know, we talk these things over.
Q. Well, what is the fact, then, if you knew anything as to what you were to do at Amboy before you got there, state what it was.
A. Well, we talked it over and was going to set out two Dunbars there.
Q. Do you know now which cars those were, in number, on the train?
A. Yes, sir.
Q. What were they?
A. They were the 11th and 12th car- from the head end.
Q. From the head end?
A. Yes, sir.
Q. When had you learned, if you can recall, that there were two Dunbars to set out?
251 A. Why, Mr. Lichtenberger, the conductor, and me talked about it coming up, as we do generally, in the caboose.
Q. That is, the rear brakeman, then, in moving from one station to the next, rides in the caboose?

A. Yes, sir.
Q. And the conductor also?
A. Yes, sir.
Q. And the front brakeman ahead?
A. And the front brakeman ahead.
Q. Now, upon arrival at Amboy that night after the train stopped, what did you do?
A. Well, I got off—that is, Mr. Lichtenberger got off first and went into the depot, and I followed him in.
Q. State whether or not Skaggs was there.
A. Yes, sir, Skaggs was right in the depot.
Q. And into what part of the depot did you go?
A. Where the yardmaster's office is most generally.
Q. What was said or done by you three, that is, the conductor and yourself and Mr. Skaggs there in the office?
A. Well, he said——
Q. That is, that you heard.
A. The conductor said he was going to set out these two Dunbars, to the yardmaster; so we all three went out together, we come out together.
Q. Did you hear anything said, or not, with reference to the through cars that were to be taken on there?
A. Yes, sir.
252 Q. What was said about that?
A. Why, he says we would have to fill out with through loads off from No. 6, set these Dunbars over on No. 4.
Q. Is that about the substance of the conversation that occurred there in the office?
A. Yes, sir.
Q. And you then did what?
A. Well, then we went out.
Q. Now, you went out upon the station platform. Just go ahead now and tell us step by step what was done; what was the first thing that you did?
A. Well, I went out and cut the cars off, cut the three cars off.
Q. You cut the three cars off, that is to say the three rear—the caboose——
A. The rear cars.
Q. You include the caboose in that?
A. The two cars and the caboose.
Q. Just explain what you did. You say you cut them off, what did you do?
A. Well, we cut them off and I rode the hind end up as far as Division street, and Skaggs was on about the third or fourth car, I don't know just exactly.
Q. When you say the third or fourth car are you counting now from the rear end?
A. From the rear end of what I cut off.
Q. Of what you had cut off?
A. Yes, sir.

253 Q. How many cars, then, were there in the string that were being pulled by the engine?
A. Twelve cars.
Q. You moved north then?
A. Yes, sir.
Q. With twelve cars?
A. Yes, sir.
Q. How far did you ride this rear car on that movement north?
A. I went as far as Division street.
Q. And what did you do there?
A. Well, I got off at Division street and crossed over. In the meantime Lichtenberger was over there getting his numbers, and I was going to throw No. 1 switch, and he called at me.
Q. You were going to throw No. 1 switch?
A. No. 4 switch, and he called at me.
Q. What switch?
A. No. 4 switch.
Q. What was the purpose of throwing No. 4 switch? You say you intended to do that—why?
A. Because Lichtenberger says we would go up the main line and shove our Dunbars in; that is the first he says, to shove our Dunbars in on No. 4, that whole train, you know.
Q. Now, you say you were going to throw that switch when Lichtenberger over in the yard called to you?
A. Yes, sir.
Q. Just what occurred? What did he say?
A. Why, he says, "We are going to make a change," he says,
254 "we are going to put the two Dunbars on the lead and put the balance on the main line." In the first place we were going to set them over on No. 4, you know, but he went there to see, there was a Freeport load there, you see.
Q. I want what he said to you, now, when he changed the orders there in the yard. You understood, of course, as you have testified, that you were going to back the two Dunbars on No. 4?
A. Yes, sir.
Q. Now, when Lichtenberger called to you, just what did he say, as near as you can recall?
A. Well, he says, "Buck, we will put the two Dunbars on the lead and put the balance on the main line."
Q. Did he give any reason why that was to be done?
A. Yes, sir.
Q. What did he say about that?
A. He says there is a Freeport load over there, and he says, we want to get it ahead.
Q. I see. Now, when you dropped off of the cut, that is, of the string of twelve cars pulled by the engine, at Division street, what about the engine and the string of cars?
A. Well, we——
Q. I want to get step by step, if I can. You dropped off at Division street?
A. Division street, yes, sir.

Q. What became of the engine and string of cars?
A. The engine and string of cars?
Q. Yes.
255 A. Well, we set the Dunbars out on the lead and then shoved the balance down on the main line.
Q. How far, Mr. Buchta, did the engine and the string of cars proceed down the main line, if at all, after you dropped off at the Division street crossing?
A. Well, they went clear to the north switch.
Q. That is what has been referred to here as the main line switch at the extreme north end of the yard?
A. Yes, sir.
Q. And that is the only switch (it is leading, but I guess there is no dispute about it) that is the only switch over which you could get into the yards from the north end?
A. Yes, sir.
Q. Who attended the train up to the main line switch?
A. Stag went up there.
Q. You refer to him as "Stag." I have noticed you in saying that a moment ago; you refer to Mr. Skaggs?
A. Well, Skaggs.
Q. You weren't well acquainted with him?
A. No, sir.
Q. Had he been on any run with you, or not, prior to the other trip or the other portion of this round trip which you were completing?
A. No, sir, this is the first time I have seen him.
Q. Now, after this conversation with the conductor, Mr.
256 Lichtenberger, changing the orders on account of the Freeport on No. 6, what was the further movement of the train? That is, the train had gone on up to the switch; did the train back down?
A. Yes, sir.
Q. Just tell us about that, where did it stop and what did you do and what do you know about it?
A. Well, we backed down as far as the lead, that is where we go into the yard, that is, next to the passing-track switch, and me and Mr. Stag were near together.
Q. Then what was done?
A. And I told him, Stag,—I cut the cars, and in the meantime I was telling him, now, we will cut these two Dunbars off on the lead here, and he will ride the head end up, and when he comes across I would catch it so to protect the rear end.
Q. Now, you say you cut the Dunbars off?
A. I cut the two Dunbars off.
Q. In other words, when Skaggs came back with the string of cars to cut off the Dunbars, you then told him of the change in orders which Lichtenberger had just told you?
A. Yes, sir.
Q. And then you gave him the instructions that you have just stated, as to what was to be done?

A. I told him we would shove them down the main line, and he should shove them into clear of the main line,—of the passing-track.

257 Q. Now, I want you to indicate on plat Def't's Ex. 3, if you will just help me here, Mr. Buchta, please, because I want you here anyhow to point out. I want to ask you whether your attention was called to this plat in Mr. Butler's office the other evening.

A. Yes, sir.

Q. Well, then you have seen it before?

A. Yes, sir.

Q. I want to just call your attention now to the location so the plat won't be confusing. Here is the passenger depot, up here is the main line switch at the north end of the yards.

A. Yes, sir.

Q. And here is Division street. Now, I want you to point out, Mr. Buchta, on the plat where those two Dunbars were cut off and left standing.

A. Well, it was right along near the passing-track, right along in there some place. Of course I couldn't just judge, but it was right along in there.

Q. Now, I call your attention to the two switches near the point to which you direct attention.

A. Yes, sir.

Q. One is the wye switch——

A. Yes, sir.

Q. —and the other is the passing-switch?

A. Yes, sir.

Q. Now, I think we understand correctly that this wye switch leads to the track running in this direction——

A. C. B. & Q. wye.

258 Q. —and the other switch close to it is the switch from the passing-track to the lead track?

A. Goes to the lead, goes clear out to the other end of the yard, away out to the bridge.

Q. I understand. Now, having your attention called to those switches are you able to state with any more accuracy than you have where those two cars were left, those two Dunbars with reference to those switches, or do you know?

A. The two Dunbars when we shoved them down?

Q. When you shoved them in and cut them off.

A. Well, they were right along there some place, right pretty near heading against the lead. This is the switch of the lead right in there, this is the Q. switch, this is the one that goes to the lead, and it was right along in there.

Mr. Barton: Now, let the record show the witness is pointing to the passing-track at a point just north of the two switches that counsel has referred to, the one connecting the wye and the other the lead track.

Q. Now, what do you have to say about that, Mr. Buchta?

A. No, they were shoved down, I says. There is switches along in here, and the cars were just going down into the lead here.

Q. Now, take the head end. Take the most southerly car; that is, that would be the twelfth car of the string, take that one alone, where was that standing, if you know, after you cut them off?

259 A. You know, this passing-track switch here, we had it open, you know, and it leads right down the lead; they were just kind of drifting right down somewhere along in there, that is, headed in toward the lead; the two were standing right along in there some place.

Mr. BARTON: Now let the record show with his pointer he is pointing over and on both sides of those two switches.

Mr. BRACELEN: That is correct, in the vicinity of those two switches.

WITNESS: I just wanted to show the jury about the lead, you know.

Mr. BARTON: Well, there is no question pending now.

Q. Well, if you have any further explanation to make your position clear to the jury, of course you are at liberty to make it; if you haven't, why, resume the chair.

The COURT: If you wish to make any further statement to designate the place where those cars were left——

WITNESS: The only thing is the two cars here—we had this passing-track switch here open, and they would go down the lead, you know, when they backed down with the twelve cars, went way down along the lead, right along in there.

Mr. BARTON: That is, now, still pointing to the two switches.

Mr. BRACELEN: Very well; the jury sees where you are pointing. You may resume the chair.

Q. Now, Mr. Buchta, as regards your movements and so
260 far as you saw and observed Skaggs, his movements and actions, right at that point let us get it clear, you backed in and stopped those two Dunbars at the point you have been indicating?

A. Yes, sir.

Q. Now, what did you do and what did Skaggs do so far as you know, if anything, as to cutting off those cars?

A. Why, I cut the cars off.

Q. That would be between the 10th and 11th?

A. Tenth and eleventh cars, yes, sir.

Q. Of the string of cars?

A. Yes, sir.

Q. And by cutting them off you mean pulling the pin, do you?

A. Yes, sir, and I told Stag, "We will set the balance on the main line, and be sure and put them into clear." He was a new man with me and I told him to be sure and put them into clear, "and I will catch the rear end of the cars when you shove them down the passing-track."

Q. And what was done then with the string of cars, that is, the ten cars left attached to the engine?

A. Well, they were left on the passing-track—or on the main line, I mean.

Q. On the main line, you mean?

A. Yes, sir.

Q. You spoke a while ago of the passing-track; you had reference to the main line?

A. Main line, yes, sir.

Q. Just a moment ago. Now, what was done? You have
261 cut off the two Dunbars and have told Skaggs what is to be done as Lichtenberg has told you; now, what is done then, what do you do and what does Skaggs do?

A. Well, Skagg—I rode the rear end back, you know, and got off on the main line; Shorty—Mr. Lichtenberger—hollered at me—we made a change, you know, so I told him that we were going to leave two Dunbars on the main line—or on the passing-track, I mean to say,——

Q. On the passing-track?

A. Yes. So we cut them off and shoved the balance down the main line, you know; see?

Q. Precisely. Now, what I want to get at is, Mr. Buchta, from this point where you cut off the two Dunbars, you have now the ten cars and the two cars separated.

A. Yes, sir.

Q. What is the next movement of the train?

A. Why, it went out to the main line.

Q. To pull up over this north——

A. Over this north main line switch.

Q. Now, when it pulled up after you cut off the Dunbars and when the train pulls up what do you do?

A. Why, I am supposed to ride the rear end.

Q. It isn't what you are supposed to do, Mr. Buchta, what do you do?

A. Oh, I went, crossed over on the other side of the main line.

Q. Crossed over on the other side; just what do you mean—crossed over to what side?

262 A. On the other side, on the engineer's side.

Q. And when the engine pulls north of the main line switch with the string of ten cars, what is then done?

A. Why, we back them down the main line.

Q. Precisely. Who accompanied the cars north over the main line switch after you have set out the two Dunbars?

A. Stag; Mr. Stag.

Q. Who threw the switch up here?

A. Mr. Stag.

Q. Where were you while this movement north over the main line switch and back was being made?

A. I was waiting for the rear end to come back.

Q. When the rear end did come back what did you do?

A. I got on and rode the rear end back.

Q. Why did you board the rear end of that string coming back? Why did you do that?

A. Because I am supposed to protect the crossing and protect the rear end.

Q. Is there any rule or was there at that time any rule of the company which required you to do that?

A. Yes, sir.

Objected to as irrelevant and immaterial.

Mr. BARTON: Move that the answer be stricken out until the Court rules on the objection.

Mr. BRACELEN: The answer may be stricken until the objection is in.

The COURT: Strike the answer.

263 Objection sustained.

Exception by defendant.

Mr. BRACELEN: We offer to show by this witness that there was a rule of the company in force at the time of this accident which made it the duty of the train crew to have a member of the crew upon the rear car of any train backing towards or over a street or highway or private crossing, to have a flagman on such car, and at night to carry a white light.

Mr. BARTON: The offer is objected to because it can't serve any purpose in this case other than a self-serving declaration, and is incompetent, irrelevant and immaterial.

Objection sustained. Offer refused.

Mr. BRACELEN: Exception. Defendant now renews at this time the offer made this morning of Rule 759 in the printed book of rules referred to and produced.

Mr. BARTON: The same objection, with the additional fact called to the Court's attention that the rule hasn't any application at all. Especially the sentence there about the man—"by night a white light."

Objection sustained. Offer refused.

Exception by defendant.

Q. Now, Mr. Buchta, which car did you board when the ten cars were being backed down on the main line?

A. I boarded the rear car with a white lantern.

Q. That is, what white lantern do you refer to?

A. Well, we always have a white lantern at night; the one I had.

264 Q. That is the lantern that the brakemen use in signaling?

A. Yes, sir.

Q. And a regulation brakeman's lantern, I take it?

A. Yes, sir.

Q. Now, how far back did that rear car move and at what point did it stop?

A. Well, it stopped right about near the crossing, about half a car length, I should judge; I don't know just exactly.

Q. Your impression is——

A. Yes, sir.

Q. —about half a block?
A. Half a car.
Q. Half a car, I should say, from the nearest line of the crossing?
A. Yes, sir.
Q. And by the crossing you refer to Division street crossing?
A. Yes, sir.
Q. When the string of cars stopped at that point what did you do?
A. I went over to throw No. 4 switch.
Q. To throw No. 4 switch?
A. I was going to throw No. 4 switch
Q. Well, I say you went over to throw No. 4 switch——
A. And Mr. Lichtenberger called to me and says, "We made a change—" No, I was going to go over to No. 4 switch and we was going to shove in the two Dunbars there on the passing-track
265 and Stag was to cut off the engine and come around and shove the two Dunbars in on No. 4 switch.
Q. Now, you walked from the point at which you cut off about half a block from Division street, you walked in what direction and to what point? Perhaps you had better indicate it on the plat here and so the jury will see the plat; getting off, now, near the Division street crossing and within half a car, you say; where did you go?
A. I went right there, right along there I got off.
Q. This, you notice, is the house-track.
A. That is right; here is the main line. I went up too high. I got off there, and got right over here. I was going to throw No. 4 switch to back in these two Dunbars.
Q. Precisely. Now where, to what point did you get? How far did you walk in the direction of No. 4 switch? I want to know simply whether you got the switch and threw it or not.
A. Yes, I got through the switch we was going to put the two Dunbars down in.
Q. When you got off and started No. 4 switch what became of the engine and the string of cars that you had left standing on the main track?
A. Why, they were standing there.
Q. I know; I want to know what the next movement of them was, Mr. Buchta.
A. Well, Mr. Stag was supposed to cut the engine off and come around and shove these two Dunbars down in there; in the meantime this happened.
266 Q. You may take the chair now. The cars were left standing and you walked to No. 4 switch, and the next you know is the happening of the accident?
A. Yes, sir.
Q. What was your first knowledge of the happening of the accident, the first information you had that anything was wrong?
A. Why, the engineer tooted the whistle.
Q. Where were you at the time the engineer tooted the whistle?
A. Right down near No. 4, right near down along No. 4 switch there.

Q. What did you do upon the blowing of the whistle?

A. Why, when he blowed the whistle I run up there, Mr.—the engineer met me halfway in between, about halfway in between where this happened and the Division crossing——

Q. And the Division street crossing?

A. Yes, sir.

Q. What did you say as you recall his words?

A. Why, he says, "Buck, Stag is hurt." And so I says to him then, "If he is hurt I better go back and get the doctor."

Q. What did you do then?

A. Then I went, and first, told Mr. Lichtenberger, my superior,—I went and told him that Stag got hurt.

Q. Where did you find Lichtenberger?

A. I found him coming right along there, right along No. 4 switch, somewhere along in there, No. 3. I don't know just exactly.

267 Q. Which way was he going?

A. He was coming right towards me.

Q. Did he make any comment at that time as to why the whistle was blowing or anything of that nature?

A. Yes, sir.

Q. What do you recall passed between you and Lichtenberger—you told him that Skaggs had been hurt?

A. He told me to go down—I says, "Well, I better go and get the doctor." He says, "Yes, go right down and get the doctor and notify the men in the yard office that Stag was hurt."

Q. What did you do then?

A. Then I went around and tried to get the doctor.

Q. And which way did Conductor Lichtenberger go, if you noticed?

A. He went up and examined the cars.

Q. Went up towards the place of the accident?

A. Yes, sir.

Q. Now, when did you yourself first go up, if you did go, to the place where the car and the engine had cornered?

A. In fact, everything was over with——

Q. Well, I will get at it another way: You went to get the doctor?

A. Yes, sir.

Q. And, pursuant to Lichtenberger's orders, to tell the trainmen in the office?

A. Yes, sir.

Q. Now, what did you do in fact? Just where did you go and what did you do?

268 A. Well, I told the operator to get the doctor to hurry up and pick up Mr. Stag because he was hurt up there, and I wanted him to get up there as soon as he could.

Q. Then what did you do after telling the operator to get the doctor? That is the operator at the station, I understand?

A. Yes, sir. I went around and come up here, and while I was helping get the doctor, these men were picking him up.

Q. Did you yourself then after going to the station direct that

the doctor should be called, did you yourself then go back to the place of the accident?

A. Yes, sir.

Q. And when you got back to the place of the accident what did you observe as to the condition there as to where Skaggs was and as to the location of the engine and cars? Just tell us what you found.

A. Well, they were just carrying Mr. Stag right by me, you know, and I went up, and the cars was cornered on the main line right between the tank and the passing-track, and I went up; the engineer was up there and he pulled away from them cars, pulled away from them.

Q. You remained there while the engine was pulled away from the car which it had cornered?

A. Yes, sir.

Q. In doing that the tender simply scraped past the corner of the car?

A. Yes, sir.

269 Q. Did you examine the tender, the rear end of the tender, as to any damage which had been done to the tender?

A. No, sir, I didn't; Mr. Lichtenberger did that; I had nothing to do with that.

Q. As I understand it, Mr. Buchta, the crew laid over at Amboy on account of this accident, so that you didn't go ahead and pull out your train in the regular way?

A. Yes, sir.

Q. You remained at Amboy until what time?

A. Well, we laid there until about 9 or 10 in the morning, something like that.

Q. The next morning?

A. The next morning.

Q. Mr. Skaggs was taken away to the hospital that night, was he?

A. Yes, sir.

Q. Did you or Mr. Lichtenberger accompany the ambulance, or how was that?

A. No, sir, we didn't; we had to go for the doctor to Dixon; after this happened they sent us to Dixon for the doctor, to another doctor.

Q. To Dixon?

A. Yes, sir.

Q. How did you go to Dixon for him?

A. With our engine and caboose.

Q. That is, you ran to Dixon with the engine and caboose to get another doctor?

A. Yes, sir.

Q. And then ran back with the doctor?

A. Yes, sir.

270 Q. Did you bring another doctor?

A. Yes, sir.

Q. How long did that take, if you remember?

A. About an hour, something like that.

Q. Is Dixon the next station north?
A. No, it is the second station north.

Cross-examination.

By Mr. BARTON:

Q. You said that you cut off the rear portion of your train at Amboy, and at that time I believe the train was standing on the main line, was it not?
A. Yes, sir.
Q. You say you cut off the caboose and three cars?
A. Yes, sir; caboose and two cars.
Q. Caboose and two cars. When you left the station what direction did you go, north or south or east or west?
A. Well, when I left the station we went out to go north; I was supposed to cut the cars off and I cut the cars off and me——
Q. Well, to cut them off which direction did you go after you came out of the station?
A. Went north.
Q. How far north did you go?
A. Well, I went to Division street crossing. I did, and jumped off.
Q. Well, I mean, though, to cut those three cars off, the caboose and two cars, how far did you have to go before you cut off those two cars?
271 A. Well, we cut them off right there near the depot.
Q. How near the depot?
A. Right out from the yardmaster's office.
Q. So that you didn't have to walk north at all, then, to make that cut?
A. No, sir, we stood right near the depot.
Q. Your caboose was just south, then, of the depot, I suppose?
A. No, sir, we walked right out and there was the three of us standing right there.
Q. Oh, you walked right across from your caboose into the station?
A. Yes, sir.
Q. Skaggs was the head man?
A. Yes, sir.
Q. He was riding the engine?
A. Yes, sir.
Q. Who got off of the caboose first, you or the conductor?
A. I think the conductor got off first.
Q. Who went into the station first, you or he?
A. Why, the conductor, and I followed him right in.
Q. And where was Skaggs when you so cut off the caboose and two cars?
A. He was in the yard office then.
Q. He hadn't come out yet?
A. No, sir.
Q. Had the conductor come out yet?

A. No, sir, we all three was in there.
Q. You cut off the caboose and the two cars while you were in the office, did you?
272 A. No, sir; no, sir.
Q. Well, I was asking you where Skaggs was when you cut off the caboose and the two cars, and you said he was in the office.
A. You asked me when we got off the caboose.
Q. Oh, no, I said when you cut off the caboose and the two cars where was Skaggs?
A. Why, he was right there with me.
Q. Helping you?
A. Yes, sir, right there with me.
Q. Yes, certainly, he was helping you cut off the caboose and the two cars?
A. I cut the cars off.
Q. Well, what was he doing?
A. He was standing there waiting for me to cut them off and get so we could do our work.
Q. Then after you cut them off what did you do?
A. Why, I gave the engineer a signal to go ahead.
Q. Who gave it?
A. I gave it, and he went ahead.
Q. What did you do then?
A. Well, I rode the rear car, and Stag was about the third or fourth car, I am not sure, about the third or fourth car, and I rode the rear car up to Division street crossing, and I got off at Division street crossing; in the meantime Lichtenberger——
Q. Well, now, you rode up to the crossing, you got off the car then, did you?
A. Yes, sir.
273 Q. The train went on; that is, the engine with the cars attached to it went on north?
A. Yes, sir, to set out our two Dunbars.
Q. Then they went on and you got off and you walked over towards track 4 or switch 4?
A. No, we had two Dunbars to set out.
Q. Well, now, just wait, don't let these Dunbars run away with us. You dropped off of the train and you walked west across the tracks towards switch 4 for the purpose of throwing that switch, didn't you?

Mr. BRACELEN: He hasn't so testified, Mr. Barton.
Mr. BARTON: Well now, I am asking whether that ain't the fact.

A. No, sir, I didn't do that.
Q. Why, you were going to set those two Dunbars out on track 4?
A. Yes, sir, but Mr. Lichtenberger went over and called me and says we will change, because there was a Freeport load over there.
Q. Now, the fact is that you did ride your train up to Division street and you got off there?
A. Yes, sir.

Q. And you hadn't seen nor spoken to Lichtenberger after leaving the station until after you had been up at Division street?

A. After he had told me what work we had to do.

Q. But you didn't speak to him until after you had been up to Division street?

A. Why, he hollered to me when——

274 Q. Where were you when he hollered to you?

A. I was just going up right near Division street.

Q. You were going up?

A. No, going south, lining the switches to back down these Dunbars on No. 4.

Q. Well now, you had ridden up to Division street and got off and went across towards track 4 before you had seen or heard Lichtenberger after leaving the station?

A. No, he hollered at me after I got up towards him there, he hollered to change this switching.

Q. You had walked over, though, from the main line track and towards him and was near to switch 4 when Lichtenberger hollered to you?

A. I was going along in near No. 4 and I was going to line up the lead to pass them down the No. 4 switch.

Q. Certainly, you wer-n't on the train when Lichtenberger hollered to you?

A. I wasn't on the train; I had jumped off there.

Q. Yes, and had gone over to the lead?

A. Yes, sir.

Q. And you were walking along the lead for the purpose of lining up the switches?

A. Yes, sir.

Q. And while you were walking along the lead lining up switches you heard Lichtenberger call to you?

A. Yes, sir.

Q. Now, how many switches had you lined up on the lead?

275 A. I didn't have any lined up because he hollered at me, "We will change the switches."

Q. As soon as you got to the lead you heard Lichtenberger holler to you?

A. Yes, sir.

Q. But you were at the lead when he hollered to you?

A. Yes, sir, right along there, yes.

Q. And at that time your engine and the train were up north on the main line some place?

A. Yes, sir. Stag rode the head end up and throwed the main line switch.

Q. Rode the head end up?

A. Got right off at the main line switch.

Q. Now, you are sure that Skaggs rode the head end of it?

A. Yes. No, he was on that end, the third or fourth, along somewhere.

Q. Oh.

A. About the third car after I got off.

Q. Do you think that the third or fourth car from the rear end of a string of cars of twelve is the head end?

A. Well, I didn't mean that was the head end, no sir.

Q. Oh, and then the engine and those cars attached to it moved southwards afterwards, didn't they?

A. No, sir. Yes, after he got off of the main line he gave a signal.

Q. On what track did they move south?

276 A. Well, they went as far as *as* the passing-track switch, along down there.

Q. Well, on what track?

A. Towards the lead.

Q. Well, on what track were they moving?

A. On the passing-track.

Q. And they moved south on the passing-track to where?

A. Down towards—to right near the lead; down towards the lead.

Q. Down towards the lead?

A. Yes, sir.

Q. And that is the place where you did a lot of pointing on the map?

A. Yes, sir.

Q. And you think that they moved south until those two Dunbar cars came about the switch that connects the passing-track with the lead?

A. Yes, sir.

Q. And how did they happen to stop there? Who caused them to stop at that place?

A. I did; I signaled them down.

Q. Oh, you swung them down when you got down there?

A. Yes sir, because Lichtenberger told me he had made a change there.

Q. Yes, and now, up to that time you had had no talk with Skaggs about the change?

A. Not until I cut them off.

Q. So you swung them down and then you cut off the two Dunbar cars?

A. Yes, sir.

277 Q. And then you walked north again to find Skaggs?

A. No, we pulled out, and he went up to the main line, he went away out——

Q. Just wait, don't jump over this space of time here. You cut off the two cars?

A. Yes, sir.

Q. Having stopped them there yourself?

A. No, sir, the engine——

Q. Well, you signaled them to stop?

A. I signaled them down because we made this change.

Q. Then they stopped in answer to your signal?

A. Yes, sir.

Q. And then you got near to Skaggs so as to tell him about the change in the program?
A. Yes, sir.
Q. Now then, you walked north then, didn't you, to get Skaggs?
A. No, we were right there, both together.
Q. Oh, he was riding the cars as they came south?
A. Yes sir, he was right there with me together when we cut them off.
Q. That is, at the time you cut off those two Dunbar cars Skaggs was with you also?
A. Yes, sir.
Q. And he was with you when you cut off the caboose and the two cars over on the main track?
A. Over to the depot, yes sir.
Q. So Skaggs was with you pretty much all the time, then?
278 A. Right there, yes, sir.
Q. And then when you and he were cutting off these two Dunbar cars you told him about the change in the orders?
A. I says that Lichtenberger——
Q. Well, just answer my question. You told him——

Mr. BRACELEN: Let him answer.

Q. I am not asking what he said, I am asking for the fact. Did you at that time tell Skaggs about the change of the orders?
A. Yes sir, I told him that——
Q. Very well, that is what I want to get at, where you were when you told him; you have told us what you said to him. Now, after cutting off the two Dunbar cars, then you gave a signal to the engineer to go north again, that is, a go-ahead signal?
A. To go out to the main line.
Q. Well, you couldn't tell the engineer that?
A. No, I gave him a signal with my lamp.
Q. You gave a go-ahead signal?
A. Yes sir, with my lamp.
Q. You done that yourself?
A. Yes, sir.
Q. And he pulled ahead?
A. Yes, sir.
Q. And what did you do?
A. Well, I waited until Stag got off at the switch and I waited until the rear end come back and I clim- right—hanging on the ladder, you know, with my lamp.
279 Q. You hung on the ladder with your lamp; and you mean the ladder on the car, of course?
A. Yes, sir.
Q. And how far did you hang on the ladder?
A. Well, down to Division street to protect the crossing and protect everything else with the white light.
Q. And you signaled him to stop then?
A. No sir, I never gave a signal down there to stop.
Q. Oh, you didn't give any stop signal?

A. Not after we backed over there I didn't on the main line I didn't give no signal to stop.

Q. Why not?

A. Because I run over to get No. 4 switch—to put these Dunbars on No. 4, and in the meantime protecting these Dunbars to be set on No. 4.

Q. That may be clear to you, but it isn't to me. You say the reason you didn't give the stop signal is you had gone over to turn the switch to set out the two Dunbar cars when you have told us that you had set out the two Dunbar cars before you went north.

The COURT: I think there is a little confusion as to the time you refer to.

Mr. BRACELEN: Yes. I object to the question as clearly a misstatement of the testimony of the witness and misleading.

The COURT: I think you should make it plain what track, what time, what cars, Mr. Barton.

Q. Did you really know how many cars your engine had
280 hold of after cutting off the two Dunbar cars?

A. Yes, sir.

Q. How did you know it?

A. Because I knew by counting them, I knew how many we had.

Q. How many did you have?

A. We had ten.

Q. Now, you are sure about that?

A. Yes sir, after we had cut the Dunbars off.

Q. How long did you say you had been working over this part of the line of the Illinois Central road?

A. About seven years.

Q. About seven years?

A. Yes, sir.

Q. As a brakeman?

A. Yes, sir.

Q. You must have been pretty familiar with the yards then along that road?

A. Yes, sir.

Q. I suppose you had done lots of work in this Amboy yard?

A. Yes, sir.

Q. Pretty big yard for a station of that kind, wasn't it?

A. Well, yes. No, it ain't a very large yard; it has got eight tracks.

Q. You ordinarily had to do some work there every time you went through there, I suppose?

A. Always, yes sir, every time, pretty near always.

281 Q. Pretty near always you had done work there, so you had learned to know the yards quite well?

A. Yes, sir.

Q. In seven years' work at least we would suppose you would know it.

A. Yes, sir.

Q. Now, this lead track and passing-track and main track, I suppose were there all that time, they weren't new tracks?

A. No, sir.

Q. Had there been any change in that yard while you were working there?

A. Why, no, not since I have been working there.

Q. And this street crossing, Division street, was there all the time also?

A. All the time.

Q. Where did you get off when first going north on the main track after cutting off the caboose and the two cars?

A. After cutting off the caboose and two cars?

Q. Yes.

A. After we had pulled ahead?

Q. Yes.

A. I got off at Division street.

Q. Let's see if I can't refresh your recollection a little bit about where you and Skaggs were riding on that movement north after cutting off the caboose and the two cars on the main track; Do you recall that you and Skaggs had your feet in the same stirrup on the same car?

A. No, sir.

282 Q. You don't recall that?

A. Yes sir, I do. I was on the rear of the car and he was about two cars away from me.

Q. You weren't riding on the same car with your feet in the same stirrup?

A. No, sir.

Q. And when you were so going north that first time, now, after cutting off your caboose and the two cars, your intention was to set those two Dunbar cars out on track 4?

A. Yes, sir.

Q. And you got off, you say, at Division street for that purpose?

A. Yes, sir.

Q. To line up the switches?

A. Yes, sir.

Q. So that you could set them on track 4?

A. Yes sir; meantime Lichtenberger called at me.

Q. And you, as a railroad man of a long period of service, knew that the switches on passing-tracks were always lined up for the passing-track, didn't you?

A. No, not always; not in this yard.

Q. But as a custom you know that, don't you?

A. Yes, sir.

Q. And it was true in this yard as a custom also; at least your engineer—or your conductor—has said so.

A. Why, it ain't always the custom in this yard.

Q. Well now, under what circumstances is it not the custom in this yard?

283 Mr. BRACELEN: Just a moment. I want to object to the statement just made by counsel that the conductor has testified that it was the custom in this yard for the switches on the lead to be lined up.

Mr. BARTON: Oh, you see counsel is away off; I wasn't talking about the lead at all, I was talking about the passing-track.

Previous question read as follows: And you, as a railroad man of a long period of service, knew that the switches on passing-tracks were always lined up for the passing-track, didn't you?

Mr. BARTON: And the engineer or the conductor, as I say, said he made no exception, his statement was not directed particularly to this particular track, but he was asked about passing-tracks, and he didn't make any exception at all.

The COURT: Well, I think the jury will recall the testimony of that witness. If you wish to inquire of this witness in that particular, proceed to do so.

Q. Why, certainly, you understood that I was talking about a passing-track, didn't you?

A. Yes, sir.

Q. And do you now wish to say that on passing-tracks the switches are not lined up as a rule for the passing-track?

A. Not always, not in these yards.

Q. Not in this yard. Under what circumstances are they not lined up in this yard for the passing-track?

A. Because the switch engines is working around there.

284 Q. Was there a switch-engine working there at night?

A. Yes, sir, they do work there at nights.

Q. Was there this particular night?

A. Yes, sir.

Q. And do you know whether the passing-track switch was lined up for the passing-track or not this night when you were first going north on the main line after cutting off the caboose and the two cars?

A. Yes sir, it was lined, the passing-track was open.

Q. For what track?

A. For the lead.

Q. Open for the lead. How did you discover that fact?

A. Because we went up and shoved down, cut the two Dunbars off there.

Q. Well, there we are again, we have jumped two movements. I say when you cut off the caboose and two cars did you at that time know whether the switch was lined up for the passing-track or not?

A. Oh, no, not at the depot, no.

Q. Well, that is what I am talking about.

A. No.

Q. When did you learn that the passing-track switch was lined up for the passing-track or for the lead?

A. When I got off at Division street I could see by the light of it.

Q. You could see by the light of the switch?

285 A. Yes, sir.

Q. From Division street?

A. Yes, sir.

Q. From which side of the train did you cut off the caboose and the two cars?

A. On the engineer's side.

Q. That would be the east side?
A. Yes, sir.
Q. On which side of the train did you ride north?
A. I rode on the engineer's side.
Q. If you will please stand down here. Now, you say you cut off the two cars and the caboose near to the depot, and that you got on the rear car that was left attached to the engine, and got on the east side of that car and rode north along the main line?
A. Yes sir, with the whole string of them.
Q. Yes, that is right. Now, which end of that rear car were you on?
A. I was right on the hind car hanging on the ladder.
Q. Well, you were on the hind car on the ladder, and which end of that car was the ladder that you were on?
A. On the east side.
Q. Well, the east side, but which end of the east side?
A. On the north end.
Q. That is, the main part of the car was south of you as you rode north?
A. I didn't understand that question.
286 Q. I say as you rode north on that most southerly one of the cars, you were on the north end of the car?
A. Yes, sir.
Q. But on the side, of course.
A. On the side, on the ladder.
Q. And you got off at Division street?
A. At Division street.
Q. You may take the seat now. And it was your intention as you so rode north to Division street to go over and line up the switches for your train to back south on to track 4 for the purpose of cutting off the two Dunbar cars?
A. Yes, sir.
Q. That is what was in your mind?
A. Yes, sir.
Q. You knew that it was your duty to so line up those switches?
A. Yes, sir.
Q. And you knew that ordinarily you would have to line them up?
A. Yes, sir.
Q. And you knew that the first switch that you would have to give attention to was the switch connecting the passing-track with the lead?
A. Yes, sir.
Q. And you knew that that switch was about 200 feet north of the north line of Division street where it is crossed by the main line, didn't you?
A. I don't understand you there.
Q. As you so rode north on the side of the rear car after cutting off the caboose and the two cars on the main track, you say
287 you had in your mind the fact that you were going to go and throw the switches, line them up for putting those two Dunbar cars on track 4.

A. Yes, sir.

Q. So that the first switch that you would have to give your attention to was the switch connecting the passing-track with the lead, you said?

A. Yes, sir.

Q. Well, then the place where you intended to go was the passing-track switch?

A. Yes sir, but that was throwed.

Q. When did you discover that it was thrown?

A. When I got around the cars I could see it.

Q. But why did you get off at Division street when you knew that the place where you were to perform the first duty was 200 feet north of Division street?

A. Why, because I got off there because we was to make that change.

Q. But you didn't know anything about the change until after you had got off and gone over to the lead.

A. Why, Lichtenberger hollered at me; Mr. Lichtenberger hollered at me and says——

Q. Yes, after you had got off the cars and walked over to the lead he hollered to you?

A. Yes sir, he told——

Q. But at the time you got off the cars you didn't know anything about that?

A. No, not until he hollered at me; we was going to shove them down No. 4.

288 Q. Well, please explain why you got off 200 feet away from the place where you intended to do your first work.

A. Well, because the head brakeman rode up and he lined the switches, in the meantime I go to work, does my business, go and lines the switches and protect the rear end, as it comes back I walk up to it.

Q. Well now, you have said several times it was your duty to line up the switches, now you say it is Skaggs' duty; which do you mean?

A. I mean the main line switches, not the switches in the yard.

Q. Certainly, I am not talking about that, I am talking about the switch on the passing-track connecting with the lead which you say you intended to line up when you were riding north on the main track.

A. Yes, sir.

Q. Yet you got off 200 feet away from it?

A. Yes, sir.

Q. Why?

A. Why, we was going to shove these two Dunbars in on No. 4 and Lichtenberger was over there and called my attention to make a change on them.

Q. But he did that after you had got off the train and walked over to the lead?

A. No, he told me to put the two Dunbars down and the rest down the main line, but leave the two Dunbars on the lead and shove the rest of them down the main line.

Q. He did that after you had walked over to the lead, but
289 what I am after to know—you have given us here a statement that you got off at Division street for some particular purpose when you rode north; now, it appears from your testimony that you intended to go to the switch connecting the passing-track with the lead, which was 200 feet north of that; I want to know what the reason for that change is.

Mr. BRACELEN: Well now, just a moment. I object to that question because it contains the assumption contrary to the fact that there is any change in the testimony of the witness; in other words, it assumes that the witness has stated that he intended to go to the passing-track switch, when he hasn't so testified.

Mr. BARTON: I insist he said it not once, but half a dozen times.

The COURT: I understood him to so state. I think the question is proper.

Exception by defendant.

Q. Now, if you have any explanation I would be glad to have you make it, and I know the jurymen will too.

(Pause and no answer.)

Q. If you haven't any, we will stop with it.

(Pause and no answer.)

Mr. BRACELEN: Ask your question; you haven't any question.

Mr. BARTON: I have asked him for his explanation and he doesn't give it.

The COURT: Do you understand the question now?

290 WITNESS: No, I don't understand that question.

The COURT: You will either have to read it or restate the question, Mr. Barton.

Mr. BARTON: I have asked it often enough, and I have got no answer. I will drop it.

Q. You have said that you cut off the two Dunbar cars on the passing-track and about the place where the passing-track is connected by a switch with the lead; what was the first thing you did after cutting off those two Dunbar cars?

A. Why, when I cut the two Dunbars off I told Stag that we would set the other balance of the train—cars—down the main line, go out to the rear switch and go down the main line, and he rode the head end up and I was—I catched the cars as they come back, and I told him to shove them into——

Q. Now, just wait; let us take one at a time.

A. I told him to shove them into clear.

Q. Now, I asked the first thing you did after cutting off the two cars; now, I would like you to answer it.

A. I gave a signal to proceed, to go ahead.

Q. Then what was the next thing you did? Not what Skaggs did, but what did you do?

A. Why, I went—he went up there and rode the head—I went and staid right there near the switch and waited for them cars to

come back down the main line; I went out to the main line and throwed them——

Q. You remained standing, then, near this switch that
291 connects the passing-track with the lead, and Skaggs and the train went on north?

A. Yes sir, Skaggs and the train went on north.

Q. How long did you remain standing at that place?

A. Until Stag went up and throwed the main line switch and they backed them down and I caught them on the other side.

Q. When did you move from the passing-track switch over to the main line?

A. Why, just as soon as—I went right over there just as soon as he backed them down, I caught them coming along, to protect the crossing.

Q. Did you have to walk fast to get across there in time?

A. Why, no, just a little ways there.

Q. But you had to get over pretty quick?

A. Yes, sir.

Q. As soon as they started north you started to go across?

A. Yes, sir.

Q. Is that right, now?

A. I went across over there to catch the hind end; I told him that he would put them on the main line.

Q. Well, did you start across just as soon as the cars started to move north?

A. Why, sure I went right over there to catch them.

Q. And you got over there just in time to catch them?

292 A. Why, he went up and backed in, and I caught them when they came back.

Q. Well now, when did you catch them, as soon as they got over there or did you wait a while?

A. I waited until they came back.

Q. How long did you wait?

A. Maybe a minute or so.

Q. And you got on them when they came back?

A. Yes, sir.

Q. And you rode how far?

A. I rode to Division street crossing.

Q. What did you do then?

A. Well, when we got to Division street crossing and I went around the other side of the track and was going to line up No. 4 switch, in the meantime Lichtenberger hollered at me that he had a Freeport to pick up there.

Q. Very well. Just wait, because I don't want all this story in answer to one little question. When you got to Division street you got off, you say; did you get off before the cars stopped?

A. No sir, I waited until they stopped; supposed to wait until they stop—with my lantern to protect the cars.

Q. You knew they were going to stop?

A. Yes. I told Stag to shove them down to the crossing and then I would line up No. 4. I would run around to line up No. 4.

Q. So you knew they were coming to a stop there?
A. Yes sir, after they came into clear.
Q. And they did come to a stop?
293 A. Yes, sir.
Q. And you knew when they were going to stop?
A. Why, I didn't know when they were going to stop.
Q. Now, they stopped very close to the crossing, didn't they?
A. About a half a car, or something like that.
Q. That is, they were about half a car away from the crossing?
A. Yes, sir.
Q. And you knew there were twelve cars?
A. There were ten cars at that time.
Q. Or ten cars at that time, and you got off and walked around?
A. I walked around to line up the—throw—put these two Dunbars on No. 4.
Q. You didn't give any more signals?
A. I didn't give any signals.
Q. Didn't give any signals?
A. No, sir.
Q. How many years did you say you had been working over that division?
A. Seven years.
Q. And you made how many trips a week?
A. Well, we make about two trips a week now; I go to Clinton and back.
Q. This is, by that you mean round trips, I suppose.
A. Well, go down one day and back the next.
Q. So that six times a week you went through Amboy?
294 A. No, not six times, about four times; we go clear to Clinton.
Q. Yes, four times a week; I see, two round trips would be four times a week you went through Amboy, and you say almost every trip you had work to do at Amboy?
A. Most generally, yes sir.
Q. And that continued over a period of seven years?
A. Well, I wasn't on this run for seven years; I was on this run for two years.
Q. And you have said that you were very particular about the question of clearing that switch?
A. I said to shove them down to clear the lead switch, yes sir.
Q. You were very particular about that, and you were the old man, the rear man, on the train?
A. Yes, sir.
Q. You had the rear position because you were the old man?
A. Yes, sir.
Q. The new or inexperienced man is put at the head end?
A. Most generally, yes sir.
Q. The experienced man is always given the rear position?
A. Most generally, yes sir.
Q. And with all your knowledge and experience you let this train come to a stop when it wasn't into clear and you did nothing?

Mr. BRACELEN: Now, I object to that question as not proper cross-examination, as intending to imply in the form of it that
295 the witness knew that the head end of the train wouldn't be in the clear, and as incompetent.

Objection sustained.

Q. You knew how many cars could be placed on the track, didn't you?

A. Just about; yes sir.

Q. Certainly; you knew how far they had to be from the switch in order to clear, too, didn't you?

A. No, not just exactly I didn't know; I didn't——

Q. Well, if you were so particular about telling Skaggs to be sure and get the cars into clear, did you never think about it when you saw that he stopped short of the crossing at Division street, didn't you think about it at that time?

A. Why, I told him to shove them down into clear, to be sure and shove them down into clear, because he was a young man, I wanted to have him shove down there into clear.

Q. And you knew that Skaggs was on the engineer's side of the train?

A. Why, yes, he was on the engineer's side of the train.

Q. You knew that he couldn't see across to the other side?

A. I don't understand the question there.

Q. That he couldn't see the left-hand side of his train?

A. Why no, he couldn't, no.

Q. Of course not, and you saw him on the engineer's side,
296 he was riding down on the engineer's side?

A. Yes sir; he was going to cut the engine off.

Q. Certainly, and you saw him give the stop signal?

A. No sir, I didn't.

Q. You didn't see that?

A. No, sir.

Q. Which way were you looking at that time?

A. I was going around the cars to line up No. 4 switch.

Q. Then you got off the train before it did stop?

A. No, I rode down to the crossing and then I protected the crossing and when they stopped I got off.

Q. But some person gave a stop signal, didn't they?

A. I don't know; I didn't give no stop signal.

Q. Well, as you rode down south there on the main line with these ten cars which way were you looking?

A. Why, I was looking towards the south, to protect the rear end all the time going down.

Q. Never thought of looking the other way?

A. No sir; because I was supposed to do that.

Q. Gave no signals of any kind?

A. No, sir.

Q. Didn't pay any attention to the fact that the train had stopped before it reached Division street?

A. Why, I told Stags to cut them off when he was into clear.

Q. Well, had it ever entered your mind that there wasn't
297 room between Division street and the main line switch to place those ten cars and have them clear?

Mr. BRACELEN: Now, that question assumes that there wasn't room; it appears here that the rear car stopped somewhere about half a car from Division street; furthermore, if your Honor please, it doesn't appear that there was any necessity for stopping that rear car before it got to Division street; and it assumes that there is some such necessity.

Objected to as incompetent.
Objection overruled.
Exception by defendant.

Q. Now do you understand the question?
A. Yes, sir.
Q. Very well, then answer it.
A. I didn't pay no attention.
Question read.
A. No, sir.
Q. Never thought of that?
A. No, sir.
Q. You had been thinking about the necessity of clearing them, but you never thought about that fact?
A. No sir, because I told him to shove them down as far as he could to clear, and then cut off his engine.
Q. But you were very familiar with this yard and the switches?
A. Why, yes, I was familiar with the yard.

Q. Yet when they came to a stop half a car away from
298 Division street you never thought that the cars weren't into clear; is that right?

Objected to as argumentative and repetition.
Objection sustained.

Q. Did you when the cars came to a stop half a car away from Division street think anything about the question of whether they were clear or not?

Objected to as repetition.
Sustained.
Mr. BARTON: This is when they were moving down, I am asking now when they stopped whether he thought anything about it.
Mr. BRACELEN: You asked that before.
Objection sustained.

Q. Now, when you got off of the cars you say you walked over or walked around the end, and then Lichtenberger called you?
A. Yes, sir.
Q. What did Lichtenberger say to you when he called you after so cutting off at Division street and walking around the end over towards the lead?
A. He hollored, he says, "We got to get a Freeport load here and

cut off the two Dunbars on the lead and shove the other balance down the main line."

Q. Where were you when you first learned of this accident?

A. When I learned of this accident?

Q. Yes.

A. I was down near No. 4 switch, to throw No. 4 switch.

299 Q. What were you going to throw No. 4 switch for?

A. To put in the two Dunbars.

Mr. BARTON: The Court will just indulge me. I am writing this down because I don't want counsel afterwards to say it hasn't been testified to.

Mr. BRACELEN: I suppose we have to submit to that sort of thing, your Honor?

The COURT: Why, I think it is very improper for counsel to make a statement of that kind.

Q. You were throwing No. 4 switch to set the Dunbar cars down when you learned of this accident?

A. I was starting to throw No. 4 switch when the engineer tooted the whistle.

Q. What was the order that the conductor had given you about the change to be made?

A. Change,—why, he says, "Go over" and, he says, "we got a Freeport to pick up here," he says, "cut off your two Dunbars on the passing-track—that is, the lead,—and shove the balance of the ten cars down the main line."

Q. And then what? Is that all of the order? Is that all he said to you?

A. He says, "Shove them down on the main line and then come in with your engine and put the two Dunbars on No. 4 and fill off of No. 6."

Q. Anything else?

A. Then pull out. Then we were going to go, and this happened and we couldn't go.

Q. That is what he told you?

A. Yes, sir.

Defendant rests.

300 FULTON M. SKAGGS, recalled in his own behalf, in rebuttal, testified:

By Mr. BARTON:

Q. You have already testified, Mr. Skaggs, that you and Buchta cut off the rear part of the train on the main line?

A. Yes, sir.

Q. And then you pulled north with the train?

A. Yes, sir.

Q. On what car did you ride?

A. I rode the rear car, in the rear end.

Q. And what car did Buchta ride?

A. He got on the same stirrup with me and the same handhold.

Q. That was the rear car?
A. That was the rear car.
Q. And where did he get off?
A. He got off north of the Division street, north side.
Q. I believe you have already said, but for fear my recollection may be wrong,—you have testified that you and Buchta were working at the cutting off of your engine on the main line just prior to the accident; now, you were working on the engineer's side, I believe, at that time?
A. Yes, sir.
Q. From which side was Buchta working?
Objected to as not proper rebuttal and repetition.

Mr. BARTON: Well, if it appears that it is repetition—why, I simply want to be sure that it so appears, your Honor.
301 Objection overruled.

A. Well, he was on the opposite side, the fireman's side, going north.
Q. So that when he made the uncoupling he made it from the fireman's side?
A. Yes, sir.
Q. And you had been trying to make it on the——
A. Engineer's side.
Q. —from the engineer's side. I believe you said that Buchta broke the air-hose at that time between the engine and the first car?
A. When we first cut off at Amboy?
A. No, no, no, no, just before you got hurt, now.
A. No, I broke the air-hose myself.
Q. Oh, you broke the air-hose?
A. Yes, sir.
Q. It was in cutting off the caboose and the rear cars that—who broke the air-hose then?
A. I broke the air-hose then.

Cross-examination.

By Mr. BRACELEN:

Q. Well, you did testify before that Buchta broke the air-hose, didn't you?
A. No, sir.
Q. You didn't testify when you were on the stand before that you and Buchta rode in the same stirrup on the rear car going up from the station the first movement, did you?
A. No, sir.
302 Q. What did you testify before as to what car you rode on when you went up from the station that first movement?
A. The rear car.
Q. You are sure that was your testimony?
A. I rode on the rear car.
Q. Well, you are sure, anyhow, that you rode on the rear car, that is your testimony now?

cut off the two Dunbars on the lead and shove the other balance down the main line."

Q. Where were you when you first learned of this accident?

A. When I learned of this accident?

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A. I was down near No. 4 switch, to throw No. 4 switch.

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Q. And then you pulled north with the train?

A. Yes, sir.

Q. On what car did you ride?

A. I rode the rear car, in the rear end.

Q. And what car did Buchta ride?

A. He got on the same stirrup with me and the same handhold.

Q. That was the rear car?
A. That was the rear car.
Q. And where did he get off?
A. He got off north of the Division street, north side.
Q. I believe you have already said, but for fear my recollection may be wrong,—you have testified that you and Buchta were working at the cutting off of your engine on the main line just prior to the accident; now, you were working on the engineer's side, I believe, at that time?
A. Yes, sir.
Q. From which side was Buchta working?
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A. No, I broke the air-hose myself.
Q. Oh, you broke the air-hose?
A. Yes, sir.
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A. The rear car.
Q. You are sure that was your testimony?
A. I rode on the rear car.
Q. Well, you are sure, anyhow, that you rode on the rear car, that is your testimony now?

A. Yes, sir, I rode on the rear car.

Plaintiff rests.
Adjourned until the morning of May 15, 1913.
The case was summed up to the jury by respective counsel.
Recess until 2 p. m.

Charge.

Gentlemen of the jury, the duty now devolves upon the Court to call to your attention such principles of law as are applicable to this case and which you will need to take into consideration in deliberating upon the case. You are the judges of the questions of fact presented in the action, and it is the province and the duty of the Court to instruct you upon the principles of law involved.

In this action the plaintiff, Fulton M. Skaggs, seeks to recover from the defendant, the Illinois Central Railway Company, for injuries sustained by him at Amboy, in the state of Illinois, which he alleges were due to the negligence of the defendant railway company.

It appears from the evidence in the case, without dispute,
303 that the Illinois Central Railway Company was on the 13th day of January, of this year, operating its line of railway through the state of Illinois, and that on the 13th day of January a freight train which has been referred to as freight No. 72 was being run from Clinton, in the state of Illinois, to Freeport; that that train comprised fifteen cars—fourteen cars and a caboose; that the train was in charge of a crew consisting of Mr. Lichtenberger, the conductor, who testified in this case; the engineer, Mr. Schmidt, who has also testified; two brakemen, the plaintiff, Mr. Skaggs, as the brakeman on the front part of the train, and another brakeman, Mr. Buchta, who has also testified in the case. It appears that while on its trip from Clinton to Freeport the train reached the station of Amboy, where it stopped and where this injury took place. As I recall the testimony, there is no dispute but that the train stopped at the station of Amboy with the train on the main track and the caboose near or next to the station platform; that this train comprised nine loaded cars destined for points outside of the state of Illinois; that it contained two cars which have been referred to in the testimony as the Dunbar cars or the Stockton cars, which were destined for Stockton, as I remember the name, and were to be transferred from this line of road at Dunbar; that while the train was on the main track at Amboy, the conductor, Mr. Lichtenberger, told the brakeman that they would put the two Dunbar cars on sidetrack No. 4 and that they should detach the cars back of the Dun-
304 bar cars, leave them standing on the track and proceed to place the two Dunbar cars on sidetrack No. 4. I think the testimony is somewhat conflicting as to the position in the train occupied by two cars referred to as the Dunbar cars. It is my recollection that the testimony of the conductor and of the brakeman Buchta was that these cars were cars Nos. 11 and 12, counting from the front of the train back, and my recollection is that the testimony of the plaintiff, Mr. Skaggs, is that they were Nos. 8 and 9. At any

rate, there is no dispute in the testimony that the train was uncoupled at the rear of the Dunbar cars and that then the forward part of the train, being the Dunbar cars and the cars that were in front of it in the train, were taken by the engine north up beyond the switch on the main track, that that switch was opened on to the passing-track, and that the train was run back, and that the two Dunbar cars then at the end of the train were left on the passing-track at about the point where the lead track came into the passing-track; that then the train—that portion of it then attached to the engine—was run north beyond the switch, passing on to the main track, and that then it was backed down on to the main track, and that the engine was then detached and all of the cars then in the train were left on the main track. Whether there were ten cars then remaining or only seven cars is a question to determine from the evidence in the case. About that matter there is some conflict, as I remember
305 the testimony. That the engine, after being detached from these cars, ran up on the main track beyond the switch to the passing-track; that that switch was thrown so that the engine could run back on the passing-track, and that then while the engine was passing from the main track back on to the passing-track this plaintiff, who was riding on the right-hand side of the tender to the engine, came in contact with the head car of those left on the main track, and that the injury to the plaintiff resulted from that contact. It appears beyond question from the testimony that the car with which the plaintiff came in contact was not in such position on the main track that the engine would clear it; in other words, that the car, the head car of these cars which were left on the main track, was too near to the junction of the passing-track with the main track to permit the engine to clear; that the plaintiff thus came in contact with it and the injury resulted.

The gist of this action is the allegation of negligence. The question to determine is whether the defendant railroad company was in any manner negligent in permitting this car on the main track to be in the position in which it was when the accident occurred. By the term "negligence" is meant the want of ordinary care; and by ordinary care is meant the degree of care commonly and usually exercised under given conditions by ordinary careful, cautious and prudent persons. To determine, then, whether one
310 is negligent you should determine whether he failed to exercise ordinary care, whether there was a failure to exercise that ordinary and reasonable care which a person of ordinary prudence would exercise under the same circumstances. It becomes important for you to determine from all of the evidence in this case whether the act of the defendant railway company, through its employes or any of them then in control of the operations of that train, failed to exercise ordinary and reasonable care. I will not undertake to review all of the testimony bearing upon the actions of the trainmen while at that station of Amboy in placing these cars upon the main track or in any of their operations there, but I call your attention particularly to the importance of the careful consideration by you of all of the testimony, because it is upon that testimony,

and that alone, that you must determine the important question of fact in this case, whether there was negligence on the part of the railroad company at that time and whether that negligence, if there was negligence, was the direct and proximate cause of the injury sustained by the plaintiff. There is no question in the case but that the plaintiff was injured and in the manner in which I have called to your attention.

This action is for an injury, as I have before stated to you, which was sustained in the state of Illinois, and some reference has been made to that fact by counsel. The fact that the accident occurred in the state of Illinois is not material for you to consider, and I speak of it only in order to call your attention to the law
307 which is applicable to this case. The case is properly brought in this state and in this county, there is no question about that; but, going to the facts of the case as disclosed by the evidence and as shown by stipulation of the parties, this train was engaged in interstate commerce, interstate traffic, at the time this accident took place, and so the case is governed by federal law, and on that account I wish to call your attention to the federal law applicable to the facts in this case.

There is a federal law, enacted in 1908, and still the law, that every common carrier by railroad, while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier. So under that provision of the federal statute, if any employe of the railroad company was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant railway company would be liable for that negligence.

The testimony discloses, I think, so that there can be no question about it, that if there was any negligence on the part of the railroad company at this time it was through the negligence of its employe the brakeman, Mr. Buchta. You will recall the testimony as to the acts of the employe, the brakeman Buchta, at the time these
308 cars were set on the main track—the testimony both of Mr. Buchta and of the plaintiff in that regard; and it becomes important for you to consider all of the testimony, that of the plaintiff and of Mr. Buchta and of the other witnesses in the case as to what acts were done, what was said and done by Mr. Buchta at that time. There is a direct conflict of testimony in that regard, as I recall it, which testimony I will not undertake to review but will leave for you to determine from your recollection of that testimony: Did the employe Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company. You must determine this question of fact from all of the testimony in the case. If the brakeman

Buchta did not fail to exercise that reasonable care which a person of ordinary prudence would have exercised under the same conditions and circumstances, then the defendant railway company would not be guilty of negligence in this case and the plaintiff would not be entitled to a recovery in any amount in this action, because the plaintiff cannot recover unless the defendant railway company was negligent under the definition of negligence which I have given you.

If you find, then, from all of the testimony in the case
309 that the brakeman Buchta was not negligent and that the railway company was, therefore, not negligent, then your verdict must be for the defendant and you would need to consider no other matters in the case.

If, however, you find from all of the testimony in the case that the defendant was so negligent, then you would need to find for the plaintiff in some amount, and it would be necessary for you to consider the further question of damages in the case.

Should you find the defendant negligent, and therefore liable in damages to the plaintiff, then you would consider the question as to the amount of damages which the plaintiff is entitled to recover, and you would find—if you find him entitled to any damages at all—such damages as will fairly and justly compensate him for the injuries sustained by him. And you should take into consideration the mental and physical suffering endured by him by reason of the injury, his loss of time because of the injury, the impairment of his ability to earn wages by his employment, take into consideration the character of the injury, its permanency, and, after considering all of those matters, determine what amount, in your judgment, would fairly and justly compensate the plaintiff for the injury sustained.

The federal law to which I have called your attention contains this further provision,—and I quote from the law: "That in all actions hereafter brought against any common carrier by
310 railroad under this act to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe." That rule changes the rule in Minnesota courts with reference to the effect of contributory negligence. Under the common law in actions such as this if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. His negligence (if he was negligent) would be taken into consideration, and that a comporative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be con-

sidered by you. The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the
311 damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame. So, besides determining whether the defendant, under the instructions which I have given you, was negligent, you are further to determine whether the plaintiff was himself negligent and whether that negligence (if you find there was such on the part of the plaintiff) contributed to the cause of this injury, and then if you find that he was negligent in any degree you will apply the rule as I have stated it to you under this federal statute to which I have called your attention.

The burden of proof is upon the plaintiff to satisfy you that the defendant was negligent before you would be entitled to find for the plaintiff and against the defendant because of the defendant's negligence. That is, he must satisfy you by a fair preponderance of testimony that the defendant was guilty of acts of negligence,—and by preponderance of testimony I do not mean the greater number of witnesses, but testimony that has the greater weight in your minds. That burden rests upon the plaintiff in this action. Upon the question of contributory negligence the burden would rest upon the defendant to satisfy you by a preponderance of evidence that the plaintiff was guilty of contributory negligence.

312 You are the sole judges, as I have before stated to you, of the questions of fact necessary to be determined to reach a conclusion in this case. And you are the sole judges of the credibility of the witnesses. It is for you to determine the weight to give to the testimony of every witness who has testified in this action. You have a right, and you should, take into consideration the interest of the witness in the result of this trial, his demeanor on the witness-stand, the probability or improbability of the truth of the testimony given by him, its reasonableness or unreasonableness, the opportunity for knowledge on the part of the witness as to the matters about which he has testified, and any other matters which to your mind affect the weight of testimony given by any witness. And if you believe that any witness has wilfully testified falsely with reference to any material matter in the case, then you have a right, you may if you choose, disregard the entire testimony of that witness except so far as it may be corroborated by other credible testimony in the case.

I have given you my recollection of some of the testimony in this case, I have made statements to you of the testimony as I remember

it, and counsel have also stated to you the testimony as they recall it, but you are to be guided by your own recollection of what the testimony actually was in this case, and take neither the statements of counsel nor the statements of the Court as to what that testimony was.

From all of the testimony in the case as you recollect it you
313 are to determine the questions of fact. It devcloves upon you to ascertain the exact truth as near as you possibly can in order that exact justice may result in this trial, and you should not be influenced in the least by your sympathy or prejudice, but be guided solely by the testimony and reach that conclusion which you believe to be honest and fair with entire impartiality, and reach a conclusion which will be sustained by your best judgment.

In determining the question of damages— ifyou reach that point in the case, if you believe that the plaintiff is, under the testimony and under the instructions which I have given you, entitled to recover anything at all in this action—you will determine the amount which he is entitled to recover by the exercise of your very best judgment, and if you find that he is entitled to recover at all, give him that amount, find in your verdict such amount as you believe will fairly and justly compensate him for the injuries which he has sustained.

I wish, only by way of review, to again state to you that the right of the plaintiff to recover in this action depends upon whether the defendant was negligent. If the defendant was not negligent through the acts of its employe, the brakeman Buchta, if this employe Mr. Buchta did not fail to exercise the reasonable and ordinary care which an ordinarily prudent man would have exercised under the same circumstances, then the defendant is not liable in any amount in this action and the plaintiff cannot recover. If, however,

you reach the conclusion from all of the testimony that the
314 employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you.

I will give you two forms of verdict: one for the defendant, the other for the plaintiff, with the amount left blank, in which blank space (in case you find for the plaintiff) you will insert the amount which you find.

Should you reach a conclusion, find a verdict, when court is not in session, you may seal the verdict and deliver it to your foreman and return into court with it when court next convenes.

Mr. Clerk, you may swear an officer.

The jury retired to deliberate, and later, on the morning of May 16, 1913, returned a verdict in favor of the plaintiff, assessing his damages at the sum of $15,000.

A stay of forty days was granted.

315 DEF'T'S EX. 11.

Illinois Central Railroad Company.

Report of Personal Injury.

Instructions.—This blank must be filled out by every employe witnessing an accident resulting in personal injury and by every employe connected with the operation of trains, cars, machinery, tools or appliances by which or on account of which the accident occurred. When an accident is caused by the breaking of machinery, tools, appliances or rails, the broken parts must be so marked as to be readily identified, and turned over to division superintendent for safe keeping, to be produced if thereafter needed. This sftatement should be forwarded without delay to the head of the department in which the person making the statement is employed, who will forward to the Chief Claim Agent. Note carefully each question. Answer as fully as possible all which pertain to the particular case. Draw lines through blanks after questions which do not pertain to the case. Copy no other statement; make your own; sign in person. Write in ink.

1. Name of injured person F. M. Skaggs.
2. Residence, city, street and number Freeport.
3. Age — Nationality — Occupation Brakeman.
4. Married or single Single.

6. Was person employe? Yes. Was he on duty? Yes.

316 8. Train No. 1/152. Engine No. 1618. Kind of train Freight.

In what direction was train moving? train standing on main line engine backing into yds.

Name of Conductor Lichtenberger Engineer C. H. Schmidt.
Fireman J. M. Murphy Brakeman: Head F. M. Skaggs
Middle ..... Rear Buchta

10. Was the weather clear, stormy? Dark? Dark.
11. Where did the accident occur? Amboy
12. Accident occurred on the 13 day of January, 1913, at 2:10 o'clock a. m.
14. If accident occurred on tracks or in yards, what, if any, obstructions were there? Cars being shoved down main line did not clear passing track.
15. Was the injured person familiar with the place? don't know. If an employe, how often had he been there? either 2 or 3 times.
18. Was bell rung? Yes. By whom? ringer.
25. If train was backing up, who was on rear end? Light eng. & brakeman hanging on rear of tank.
26. If injured person was an employe, what was he doing when injured? Riding on R. back end of tank to back into yards. How long had he been a railroad man? about a week or 10 days

30. Could the injured person have prevented the accident
317 by exercising ordinary care? Yes. If so, how? by shoving cars down main line so they would clear passing track.

31. Was the injured person insane, intoxicated, blind, deaf or lame? No.

32. What is the nature and extent of injury? (if leg or arm, state whether right or left) Right leg crushed off above ankle & right arm bruised so it had to be amputated.

33. Name of surgeon called Wilcox & Sullivan & got a doctor from Dixon.

36. Are your answers from your own knowledge? Yes.

37. Mr. V. N. Powell M. M. of Freeport, Ill., is always familiar with my whereabouts.

38. Cause of accident? (State fully) In switching cars out of train at Amboy and shoving the head end down main line suppose to go back into yards to pick up some others. The cars on main line were cut off not in the clear of passing track and in backing down into yards the brakeman riding rear of tank to eng. got crushed between cars & tank, as they did not clear so eng. could pass.

Name.	Occupation.	Residence (street, No., and city).
C. H. Schmidt	Engineer	51 Wilton St., Freeport, Ill.
Lichtenberger	Conductor	Freeport, Ill.
Buchta	Flagman	Freeport, Ill.
J. M. Murphy	Fireman	Freeport, Ill.

I certify that the above statement made by me is correct — day of January, 1913.

318 Address Freeport, Ill.

(Sign Here) CARL H. SCHMIDT,
Occupation, Engineer.

DEF'T'S EX. 12.

FREEPORT, Feb. 5th, 1913.

F. M. Skaggs, Freight Brakeman, Injured Amboy, Ill., Jan. 13th, 1913.

Q. What is your name and address?

A. Carl Schmidt, Freeport, Ill.

Q. How are you employed?

A. As locomotive engineer by the I. C.

Q. At the time of injury to the above named, what engine were you handling?

A. Engine No. 1618.

Q. After arrival at Amboy, please state what movements were made up to the time of accident?

A. We stopped so that the train was opposite the depot. Then one of the brakemen cut off the head end of the train and I pulled up to the passing switch. I knew that we had two cars to set out. We backed in on the passing track and these two cars were cut off. I then pulled ahead over the passing switch and then backed down

the main line and engine was cut off from the head end. Engine then ran up over the switch and Skaggs threw it and gave me a back-up signal. As the tank reached him, he boarded same. After I had backed a short distance, he disappeared and the next moment we cornered the first car of the head end of the train, which had just been set out on the main line.

319 Q. When you were setting the head end back on the main line, where was Skaggs riding?

A. I think that he just walked over and threw the switch after cutting off the two Dunbars. I don't think he was riding at all.

Q. After pulling over the passing track switch, and before you backed head end down the main line, who gave you the signal to back?

A. Skaggs did.

Q. After you had shoved the head end down south of the switch, who gave you a stop signal?

A. Skaggs did.

Q. Where was the other brakeman?

A. Down around the crossing some place. I saw him when we started to back but did not see him when we stopped.

Q. In making these movements, was the other brakeman giving you any signals direct?

A. No, I was taking all the signals from the head man, Skaggs.

Q. Who cut off the engine after the head end had been shoved down?

A. Skaggs did. He was in between so long that I wondered what he was doing.

Q. After he cut off and gave you a go-head signal did he board the engine and ride up to the switch?

A. Yes, then he got off and threw the switch.

Q. After you got up north of the switch, did Skaggs go back and measure to see whether the cars cleared?

A. No, I pulled up not more than two or three feet north
320 of the switch and he threw the switch and then gave me a back-up signal at once and got on the corner of the tank as it came to him.

Q. Did he at any time, before backing up, go back and measure to see whether the car cleared?

A. Not to my knowledge. If he did measure them, it was when he was in between the tank and car before he cut off the engine from the head end after setting it down on the main line.

Q. After you pulled north of the switch, before coming in on the passing track, is it true that Skaggs went down and measured to see whether the car cleared and then came back and made the remark to you that it cleared, and did you reply "I could have told you that before?" I could not see the cars at all so could not make such a remark.

A. No, I could see his lantern all the time and know that he did not leave the switch until he boarded the tank as it reached him. There would be no sense in walking down and measuring and then walking back to the engine. He could have given me a

back-up signal from down at the head end of the car. He never made any such remark to me nor did I make any such reply.

Q. How fast were you moving when you cornered the car?

A. About three or four miles an hour. I just gave her enough steam to start her and then shut off and was drifting.

Q. When you cornered the car, how far did the end of the tank shove past it?

A. About ten feet or so.

321 Q. In your opinion, how much further down should the head end have been shoved to clear?

A. Well, I couldn't say.

Q. You could see Skaggs plainly all the time?

A. Yes, I could see his lantern all the time until he disappeared just before the accident.

Q. Would it have been possible for these cars to have moved to the north after the engine was cut off?

A. No, they couldn't run up-hill. There is a slight downgrade to the south. If they moved at all, it would be to the south and not to the north.

Q. Where did you find Skaggs after the accident?

A. About 8 feet or so back of the tank, lying between the main line and passing track.

Q. Did you ask Skaggs how he came to be injured?

A. No. I moved him out of the water, which was running out of the tank but I did not ask him what happened.

Q. Did you tell Skaggs at any time to lean out further because, on account of the steam, you were unable to see his signals?

A. Way down the road some place, I mentioned to him that it was hard to see his signals on account of the steam. At that time, he was up ahead of me and the steam was coming from the front end of the engine, as is usual on a cold night. There was no steam coming from the rear end. When backing up, there couldn't

322 be any steam to hide my view and I could see Skaggs plainly all the time after he boarded the tank.

(Sgd.) CARL SCHMIDT.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

The foregoing transcript of testimony, consisting of 219 pages of typewritten matter, being found by me to be conformable to the truth and to contain a record of all proceedings had upon the trial, all testimony received or offered, together with all objections, rulings of the Court and exceptions taken, and the charge to the jury, the

same, together with all exhibits offered upon the trial, is hereby allowed and certified as and for the settled case herein.

Dated July 18th, 1913.

C. W. STANTON,
Judge of the District Court.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Motion.

To the Above-named Plaintiff, and to Messrs. Barton & Kay, His Attorneys:

Take Notice that on July 18th, 1913, at the Court House in the City of St. Paul, said County and State, at the hour of nine o'clock A. M., or as soon thereafter as counsel can be heard, the above named defendant will move the court for an order setting aside the
323 verdict of the jury herein and granting a new trial of said cause, on the following grounds:

1. That the verdict of the jury is not justified by the evidence.
2. That the verdict of the jury is contrary to law.
3. Errors of law committed during the trial to which exception was duly taken.
4. That the court erred in granting plaintiff's motion to strike from the record defendant's exhibit 5. (Sc. C. 84).
5. That the court erred in granting plaintiff's motion to strike from the record defendant's exhibit 5. (S. C. 84).
6. That the court erred in sustaining plaintiff's objection to the following question: "Q. Now, the plaintiff has testified, Mr. Schmidt, that he gave a signal for you to go ahead after the engine was cut off, and that you pulled up perhaps a car length, when he swung you down or gave you a signal to stop and you stopped; what is the fact about that?" (S. C. 98.)
7. That the court erred in sustaining defendant's offer in evidence of rule 759 of the Rule Book, as follows: "Cars must not be backed nor cut loose and allowed to run over a street, railway or private crossing without a flag-man on the front of or *proceeding* the leading car. By night a white light must be displayed." (S. C. 148, 149.)
8. That the court erred in striking out the answer and sustaining the objection to the following question to the witness Buchta, "Q. Is there any rule or was there at that time any rule of the
324 Company which required you to do that? A. Yes, sir." (S. C. 181, 182.)
9. That the court erred in sustaining the objection to the defendant's offer to prove by the witness Buchta, as follows: "We offer to

show by this witness that there was a rule of the Company in force at the time of this accident, which made it the duty of the train crew to have a member of the crew upon the rear car of any train backing towards or over a street or highway, or private crossing, to have a flag man on such car, and at night to carry a white light" (S. C. 182).

10. That the court erred in sustaining the objection to defendant's renewal of its offer of Rule 759 of the printed book of rules. (S. C. 182.)

11. That the court erred in charging the jury as follows: "The question to determine is whether the defendant railroad company was in any manner negligent in permitting this car on the main track to be in the position in which it was when the accident occurred." (S. C. 212.)

12. That the court erred in charging the jury as follows: "It becomes important for you to determine from all of the evidence in this case whether the act of the defendant railway company, through its employees or any of them then in control of the operations of that train, failed to exercise ordinary and reasonable care." (S. C. 212-13.)

13. The court erred in charging the jury as follows: "I will not undertake to review all of the testimony bearing upon the actions of the trainmen while at that station of Amboy in placing
325 these cars upon the main track, or in any of their operations there, but I call your attention particularly to the importance of the careful consideration by you of all of the testimony, because it is upon that testimony, and that alone, that you must determine the important question of fact in this case, whether there was negligence on the part of the railroad company at the time and whether that negligence, if there was negligence, was the direct and proximate cause of the injury sustained by the plaintiff." (S. C. 213.)

14. The court erred in charging the jury as follows: "So under that provision of the Federal Statute, if any employee of the railroad company was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant railway company would be liable for that negligence" (S. C. 214).

15. In the foregoing portion of his charge (assignment of error No. 14), the court incorrectly interpreted the Federal Statute in question, to the prejudice of the defendant, which is hereby specifically assigned as error.

16. In the foregoing portion of his charge (assignment of error No. 14), the court erred in failing to limit the negligence of the defendant, for which it would be liable to the plaintiff, to that supported in the evidence and alleged in the complaint.

17. In the foregoing portion of his charge (assignment of error No. 14), the court er-ed in failing to charge in that connec-
326 tion that, if the negligent act or omission, if any, shown, which caused plaintiff's injury, was the joint act or omission of plaintiff, and Buchta, then plaintiff would not be entitled to recovery.

18. The court erred in failing to charge the jury that, if there was any negligence on the part of the plaintiff in reference to placing or leaving the cars, with which he collided, where they were at the time of the accident, then plaintiff could not recover.

19. The court erred in failing to charge the jury that, if they should find from the evidence that the plaintiff and the brakeman Buchta were jointly responsible for the position of the cars with which the engine collided, then the plaintiff could not recover.

20. The court erred in charging the jury as follows: "Did the employee Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company" (S. C. 214).

21. The court erred in charging the jury as follows: "If, however, you find from all of the testimony in the case that the defendant was so negligent, then you would need to find for the plaintiff in some amount, and it would be necessary for you to consider the further question of damages in the case." (S. C. 215).

22. The court erred in charging the jury as follows:
327 "Under the common law in actions such as this, if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury, that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. His negligence, (if he was negligent), would be taken into consideration, and that a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you." (S. C. 216).

23. The court erred in charging the jury as follows: "The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence, which produces injury or accident, responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury." (S. C. 216).

24. In the foregoing portion of his charge (assignment of error No. 23), the court incorrectly interpreted the Federal Statute
328 referred to, to the prejudice of this defendant, which is hereby specifically assigned as error.

25. The court erred in failing to charge in the above connection (assignment of error No. 23), that if the injury resulted from the joint act or omission of plaintiff and a fellow servant, then the plaintiff could not recover.

26. The court erred in charging the jury as follows: "That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame" (S. C. 216).

27. The court erred in charging the jury as follows: "So, besides determining whether the defendant, under the instructions which I have given you, was negligent, you are further to determine whether the plaintiff was himself negligent and whether that negligence (if you find there was such on the part of the plaintiff) contributed to the cause of this injury, and then if you find that he was negligent in any degree, you will apply the rule as I have stated it to you under this Federal Statute to which I have called your attention." (S. C. 216-17).

28. The court erred in charging the jury as follows: "If, however, you reach the conclusion from all of the testimony that the employee Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries
329 sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you." (S. C. 219).

Said motion will be made upon the pleadings, records and files, and all proceedings had in said cause, and upon the settled case.

BUTLER & MITCHELL,
C. M. BRACELEN,
Attorneys for Defendant.

(Endorsed: Filed July 18, 1913.)

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Order Denying Motion for New Trial.

Motion having been made by the defendant for an order setting aside the verdict of the jury herein and granting a new trial, hearing upon which said motion was had before the undersigned at the Court House in the City of St. Paul, on the 18th day of July, 1913, Messrs. Butler & Mitchell and C. M. Bracelen appearing for the defendant in support of said motion, and Messrs. Barton & Kay appearing for the plaintiff in opposition;

It Is Ordered, that said motion be and it is hereby denied.

A stay of forty days is ordered.
Dated St. Paul, Minn., July 24, 1913.

C. W. STANTON,
District Judge.

(Endorsed: Filed July 25, 1913.)

330 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Pl'ff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Def't.

Notice of Appeal.

To the Above-named Plaintiff and to Messrs. Barton & Kay, His Attorneys, and to Matt Jensen, Esquire, Clerk of the said Court, St. Paul, Minnesota:

Please take notice that the defendant, Illinois Central Railroad Company, hereby appeals to the Supreme Court of the State of Minnesota from that certain order of the Honorable C. W. Stanton, District Judge, made and filed herein on the 24th day of July, 1913, denying defendant's motion for an order setting aside the verdict heretofore entered herein and granting a new trial, and from the whole of said order.

Dated August 20th, 1913.

BUTLER & MITCHELL,
Attorneys for Defendant, 624 Endicott Building,
St. Paul, Minnesota.

Due service of the above Notice of Appeal is hereby admitted this 20th day of August, 1913, and costs and supersedeas bond upon said appeal is hereby waived, it being agreed that all proceedings on behalf of the plaintiff herein shall be stayed pending said appeal.

BARTON & KAY,
Attorneys for Plaintiff.

Due service of above Notice of Appeal is hereby admitted this 20th day of August, 1913.

MATT JENSEN,
Clerk of the District Court.

Filed Aug. 20, 1913. Matt Jensen, Clerk.

331 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable

the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of Appeal in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 7th day of Oct. A. D. 1913.

[SEAL.]

MATT JENSEN, *Clerk*,
By C. R. SCHMIDT,
Deputy Clerk.

(Endorsed:) Filed Oct. 7, 1913. I. A. Caswell, Clerk.

332 *Assignment of Error.*

I.

The court erred in denying defendant's motion for a new trial made upon the following ground:

"The court erred in charging the jury as follows: 'The question to determine is whether the defendant Railroad Company was in any manner negligent in permitting this car on the main track to be in the position in which it was when the accident occurred.'" (Fols. 915, 971.)

II.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"That the court erred in charging the jury as follows: 'It becomes important for you to determine from all of the evidence in this case whether the act of the defendant railway company, through its employees or any of them then in control of the operations of that train, failed to exercise ordinary and reasonable care.'" (Fols. 916, 972.)

III.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"That the court erred in charging the jury as follows: 'I will not undertake to review all of the testimony bearing upon the actions of the trainmen while at that station of Amboy in placing these cars upon the main track, or in any of their operations there, but I call your attention particularly to the importance of the careful consideration by you of all of the testimony, because it is upon that testimony, and that alone, that you must determine the important question of fact in this case, whether there was negligence on the part of the railroad company at the time and whether that
333 negligence, if there was negligence, was the direct and proximate cause of the injury sustained by the plaintiff.'" (Fols. 916, 917, 973.)

IV.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"That the court erred in charging the jury as follows: 'So under that provision of the Federal Statute, if any emplo-e of the railroad company was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant railway company would be liable for that negligence.'" (Fols. 920, 921, 974.)

V.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"In the foregoing portion of his charge (assignment of error No. 14), the court incorrectly interpreted the Federal Statutes in question, to the prejudice of the defendant, which is hereby specifically assignd as error." (F. 975.)

VI.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"In the foregoing portion of his charge (assignment of error No. 14), the court erred in failing to limit the negligence of the defendant, for which it would be liable to the plaintiff, to that supported in the evidence and alleged in the complaint." (F. 975.)

VII.

The Court erred in denying defendant's motion for a new trial made upon the following grounds:

334 "The court erred in charging the jury as follows: 'Did the employee Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company.'" (Fols. 923, 978.)

VIII.

The Court erred in denying defendant's motion for a new trial made upon the following grounds:

"That the verdict of the jury is not justified by the evidence." (Fol. 967.)

IX.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"That the verdict of the jury is contrary to law." (Fol. 967.)

X.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"In the foregoing portion of his charge (assignment of error No. 14), the court erred in failing to charge in that connection, that, if the negligent act or omission, if any, shown, which caused plaintiff's injury, was the joint act or omission of plaintiff and Buchta, then plaintiff would not be entitled to recovery." (F. 976.)

XI.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

335 "The court erred in failing to charge the jury that, if they should find from the evidence that the plaintiff and the brakeman Buchta were jointly responsible for the position of the cars with which the engine collided, then the plaintiff could not recover." (F. 977.)

XII.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"The court erred in charging the jury as follows: 'The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence, which produces injury or an accident, responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damage to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury.'" (F. 930, 931.)

XIII.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"In the foregoing portion of his charge (assignment of error No. 23), the court incorrectly interpreted the Federal Statute referred to, to the prejudice of this defendant, which is hereby specifically assigned as error." (F. 981.)

XIV.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"The court erred in failing to charge in the above connection (assignment of error No. 23), that if the injury resulted from
336 the joint act or omission of plaintiff and a fellow servant, then the plaintiff could not recover." (F. 982.)

XV.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"The court erred in charging the jury as follows: 'Under the common law in actions such as this, if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence, which was a proximate cause of the injury, that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. His negligence, (if he was negligent), would be taken into consideration, and that a comparative amount depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you.'" (F. 928, 929, 979, 980.)

XVI.

The Court erred in denying defendant's motion for a new trial made upon the following ground:

"The court erred in charging the jury as follows: 'If, however, you reach the conclusion from all of the testimony that the employee Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you.'" (F. 939, 985.)

BUTLER & MITCHELL AND
C. M. BRACELEN,
Attorneys for Appellant.

(Endorsed:) Filed Jan. 10, 1914. I. A. Caswell, Clerk.

337 18528.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 303.

FULTON M. SKAGGS, Respondent,
v.
ILLINOIS CENTRAL RAILROAD CO., Appellant.

Syllabus.

Evidence in an action by a freight brakeman to recover damages sustained while jointly engaged with a fellow brakeman in switch-

ing movements, by being caught between the engine tender and cars left on another track, considered and held to warrant findings that, under the circumstances disclosed, plaintiff had the right to rely on the other brakeman's statement that the cars were clear for the engine to pass, and that the making thereof constituted negligence attributable to defendant under the Federal Employers' Liability Act.

Charge held not subject to the criticism that it authorized a recovery for acts of negligence not alleged or alleged but not proved.

Charge upon so-called comparative negligence under the federal act held technically erroneous, but not prejudicial.

Order affirmed.

338

18528.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 303.

FULTON M. SKAGGS, Respondent,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Opinion.

Appeal by defendant from an order denying a new trial after verdict for plaintiff in an action to recover damages for personal injuries.

Plaintiff, a freight brakeman in defendant's employ, was injured at about 2 o'clock, A. M., on a cold, dark night, in January, 1913, while engaged in switching cars at a station. His train stopped on the main line, with the caboose near the station. Two cars, some distance from the engine, were to be set out on a track known as No. 4, and plaintiff, head brakeman, Buchta, rear brakeman, and the conductor, so understood. Plaintiff uncoupled the train behind these two cars, and, with Buchta, rode the undetached cars northward on the main track. The latter dropped off and lined up the switches for track 4, which lay westerly, while plaintiff remained on the cars until they passed beyond the most northerly switch on the main line. This he turned when the rear car had cleared it, and signalled to back, riding the train back to a point near the switch to track 4, where the two cars were left. The engine, with remaining
339 cars, then moved forward, plaintiff accompanying them through the main line switch. He then signalled, and they were backed down again on the main track, the purpose being to return to the yards with engine alone to finish setting the two cars left near track 4, and to pick up other cars which were to be added to the train. In proceeding to carry out these movements, the engine was uncoupled and ran north past the same switch, which plaintiff

threw. He then gave a back-up signal and boarded the rear corner of the backing tender. While in this position he was caught between it and the corner of the foremost car on the main track and injured, those cars not having been shoved down far enough to clear the engine so it could pass on the switch track.

Plaintiff claims while the engine and cars were backing down the main line, after leaving the two cars in the yard and before the engine was uncoupled, he received a stop signal from the conductor, which he repeated, and thereupon the train stopped on the main line. He then proceeded to the station, and was advised by the conductor for the first time that the other cars were to be picked up, and was directed with reference to further movements. Acting accordingly, he returned to the engine, where he found Buchta at the rear of the tender, on the opposite side of the cars, nearest the switch track, who then uncoupled the air hose between the tender and cars, while plaintiff was attempting to disengage the coupling pin. The former, however, pulled the pin from his side, and plaintiff, not knowing whether the cars had cleared the switch and having previously advised Buchta of the intended movement inquired of him whether they were in the clear for the engine to back upon
340 the switch track, boarding the engine at the same time. But not receiving a satisfactory answer, he stopped and alighted from the engine, and again made the same inquiry, to which Buchta replied: "They are clear a mile, go ahead, and if we don't get out of here the 16 hour law will catch us." Whereupon plaintiff proceeded and was injured as stated. This, plaintiff's version of how the accident occurred was disputed in all material respects; but the questions raised were clearly for the jury.

1. The train was engaged in interstate commerce and concededly the Federal Employers' Liability Act applies. Defendant, however, urges nonliability for the alleged negligence of Buchta in making erroneous statements with reference to facts equally obvious to plaintiff, claiming such to be merely an opinion; and, further, that as they were jointly engaged in uncoupling the engine from the cars and seeing to it that they cleared, Buchta's negligence, if any, was plaintiff's and not defendant's. These contentions cannot be sustained. Buchta's statement, under the circumstances, was sufficient to warrant the jury in finding that it constituted negligence. It was a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto. Their being jointly engaged in working out the switching operations is of no more significance upon the question of defendant's responsibility for Buchta's negligence than is any other instance of a fellow servant's negligence, for which, under the federal act, the master is liable. We hold Buchta's negligence attributable to defendant.

2. Grounds of negligence were alleged in the complaint
341 other than last referred to, and error is assigned because the court's instructions were broad enough to indicate to the jury that they might find defendant liable thereon and otherwise,

notwithstanding lack of evidence to establish them, and without regard to pleadings. We do not find the charge subject to this criticism. Read as a whole it directs the jury's attention to the sole questions of fact for determination. Moreover, if counsel feared misapprehension in this regard, attention should have been promptly called thereto, which was not done.

3. The court read to the jury from the Federal Employers' Liability Act, as follows:

"That in all actions hereafter brought against any common carrier by railroad under this act to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

The court then charged, after adverting to the common law rule:

"But this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury, that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. His negligence, (if he was negligent), would be taken into consideration, and that a comparative amount, depend-
342 ing upon the ratio of his negligence to the negligence of the defendant, would be considered by you."

And also, in summoning up, the following was given:

"If however, you reach the conclusion from all the testimony that the employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you."

Defendant complains of the court's construction of the Federal Act, as indicated by the foregoing excerpts, citing and relying on Norfolk etc. R. Co. v. Earnest, 229 U. S. 114, decided since the trial of the present case. Therein the Supreme Court of the United States considered, for the first time, the correctness of an instruction upon the provision of the federal act in question, and criticised a charge similar to the one here involved; it not appearing, however, whether reversal on account thereof would have followed had proper exception been taken. Said the court, at page 121, after approving prior portions of the charge:

"But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the
343 diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only

mean, that, where the causal negligence is partly attributable to him and partly to the carrier he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. * * * Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant."

In view of this authoritative pronouncement, it is apparent that the instruction complained of was technically erroneous; but we are satisfied that upon the whole instruction no prejudice to defendant resulted.

Order affirmed.

PHILIP E. BROWN, *J.*

344 No 18528. State of Minnesota Supreme Court. Fulton M. Skaggs, Respondent, vs. Illinois Central Railroad Company, Appellant. Opinion and Syllabus. Filed February 6, 1914. I. A. Caswell, Clerk. Philip E. Brown, J.

345 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1913.

Wednesday morning, 9:30 o'clock, January 14 A. D. 1914 Court convened pursuant to adjournment.

Reg. No. 18528. Cal. No. 303.

FULTON M. SKAGGS, Respondent,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*
By —— ——, *Deputy.*

(Endorsed:) Copy of Minutes of Argument. Filed February 17, 1914. I. A. Caswell, Clerk.

346 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 303.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1913 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered February 17, A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk*.

(Endorsed:) Copy of Order for Judgment. Filed February 17, 1914. I. A. Caswell, Clerk.

347 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1913.

No. 303.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause February 17 A. D. 1914, it is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Forty-two and 60/100 dollars ($42.60) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed February 17, A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk*.

Statement for Judgment.

Statutory Costs $25.00. Printer $7.00. Clerk $10.60. Acknowledgments $—. Return $—. Postage and Express $—. Filing Mandate $—. Total $42.60.

348 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul February 17 A. D. 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk*.

[Endorsed:] State of Minnesota Supreme Court. Transcript of Judgment. Filed February 17, A. D. 1914. I. A. Caswell, Clerk.

349 No. 18528. State of Minnesota Supreme Court. Fulton M. Skaggs, Respondent, vs. Illinois Central Railroad Company, Appellant. Judgment Roll. Filed February 17, 1914. I. A. Caswell, Clerk.

350 STATE OF MINNESOTA,
Supreme Court, ss:

Mandate.

The State of Minnesota to the Hon. Judge and officers of the District Court of the Second Judicial District Sitting within and for the County of Ramsey, Greeting:

Whereas, Lately in your Court, in an action therein pending, between Fulton M. Skaggs Plaintiff and Illinois Central Railroad Company Defendant a certain order was entered therein July 24,

1913, from which action of your Court an appeal thereafter was taken to this Court;

And Whereas, The same was duly argued, heard and submitted; and after mature deliberation thereupon had, our Supreme Court did adjudge, determine, decree and order "That the order *judgment* of the Court below herein appealed from, be, and the same hereby is, in all things affirmed, and that judgment be entered accordingly." A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, therefore, this mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, the Hon. Calvin L. Brown, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this 17th day of February 1914.

[Seal of the Supreme Court, State of Minnesota.]

[SEAL.]

I. A. CASWELL,
Clerk of the Supreme Court.
By ——— ———, *Deputy.*

(Endorsed:) Filed Feb. 18, 1914. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

351 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

No. 111,110.

FULTON M. SKAGGS, Plaintiff,
against
ILLINOIS CENTRAL RAILWAY COMPANY, Defendant.

Pursuant to the verdict of the Jury duly rendered and filed in the above entitled action on the 16th day of May, A. D. 1913,

Now, on motion of Messrs. Barton & Kay said Attorneys, it is hereby adjudged that the plaintiff herein recover of said Defendant Illinois Central Railway Company the sum of Fifteen thousand six hundred seventy-five Dollars damages, with Thirty-one and 20/100 Dollars costs and disbursements, in all amounting to $15,706.20.

Signed this 17th day of February A. D. 1914.

MATT JENSEN, *Clerk.*
By G. A. JOHNSON,
Deputy Clerk.

(Endorsed:) Judgment Roll. Filed 17 day of February, A. D. 1914. Matt Jensen, Clerk, by G. A. Johnson, Deputy. Barton & Kay, Plaintiff's Attorneys.

352 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

FULTON M. SKAGGS, Plaintiff,
vs.
ILLINOIS CENTRAL RAILWAY COMPANY, Defendant.

Notice of Appeal.

To the above named plaintiff and to Messrs. Barton & Kay, his attorneys, and to Matt Jensen, Esquire, Clerk of said Court, St. Paul, Minnesota:

Please take notice that the defendant appeals to the Supreme Court of the State of Minnesota from the judgment entered herein on the 17th day of February, 1914.

Dated February 18, 1914.

BUTLER & MITCHELL,
Attorneys for Defendant.

624 Endicott Building, St. Paul, Minnesota.

Due service of the above notice of appeal is hereby admitted this 18th day of February, 1914, and costs and supersedeas bond on appeal is hereby waived, and it is agreed that all proceedings herein shall be stayed pending the appeal herein.

BARTON & KAY,
Attorneys for Plaintiff.

Due service of the above Notice of Appeal is hereby admitted this 18 day of February, 1914.

MATT JENSEN,
Clerk of the District Court.

353 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of appeal and waiver of bond in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof. Witness my hand and seal of said Court, at St. Paul, this 14th day of May A. D. 1914.

[SEAL.]

MATT JENSEN, *Clerk.*
By G. P. RITT,
Deputy Clerk.

(Endorsed:) Filed May 18, 1914. I. A. Caswell, Clerk.

354 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

It is hereby stipulated and agreed, by and between the above named parties and their respective attorneys, that the appeal from the judgment rendered in this case by the District Court of Ramsey County, may be and is hereby submitted upon the briefs and arguments of the attorneys for the respective parties, heretofore submitted in connection with the former appeal from the order denying motion for a new trial in this case.

Dated May 18th, 1914.

BARTON & KAY,
Attorneys for Respondent.
BUTLER & MITCHELL,
Attorneys for Appellant.

Filed May 20, 1914. I. A. Caswell, Clerk.

355 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

18851.

FULTON M. SKAGGS, Respondent,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Per CURIAM:

Appeal by defendant from a judgment awarding damages in an action for personal injuries.

The case was before this court on a prior appeal from an order denying a new trial. See 145 N. W. 381. The same grounds for reversal are presented as before.

For reasons stated on the former appeal the judgment is affirmed, and it is so ordered.

356 18851. State of Minnesota Supreme Court. Fulton N. Skaggs, Respondent, vs. Illinois Central Ry. Co., Appellant. Per Curiam Opinion. Filed May 22, 1914. I. A. Caswell, Clerk.

357 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 18851.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General April Term of this court, A. D. 1914, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed, and that judgment be entered accordingly.

Entered June 2, A. D. 1914.

By the Court:

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

I. A. CASWELL, *Clerk.*

(Endorsed:) Filed June 2, 1914. I. A. Caswell, Clerk.

358 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 18851.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause June 2, A. D. 1914, it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum

and amount of Thirty-two and 00/100 Dollars ($32.00) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 2, A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00. Printer, $—. Clerk, $7.00. Acknowledgments, $—. Return, $—. Postage and Express, $—. Filing Mandate, $—. Total, $32.00.

359 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol in the City of St. Paul, June 2, A. D. 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

[Endorsed:] State of Minnesota Supreme Court. Transcript of Judgment. Filed June 2, A. D. 1914. I. A. Caswell, Clerk.

360 No. 18851. State of Minnesota Supreme Court. Fulton M. Skaggs, Respondent, vs. Illinois Central Railroad Company, Appellant. Judgment Roll. Filed June 2, 1914. I. A. Caswell, Clerk.

361 STATE OF MINNESOTA:

Supreme Court, April Term, 1914.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Stipulation with Regard to Entry of Judgment.

By way or agreeing upon the amount of the judgment herein and without waiver by either party of any rights herein, except as to the precise amount of such judgment and any formalities as to its entry,

It is hereby stipulated by and between the parties hereto that the Clerk of said Court be and he hereby is authorized and requested to enter final judgment in said Court, pursuant to the decision of the Court herein, and not otherwise, in favor of said respondent and against said appellant, for the sum of $16,061.73, which includes the amount of the judgment entered in this action in the District Court of Ramsey County on February 17th, 1914, and the amount of the judgment for costs and disbursements in this Court upon the first appeal herein entered February 17th, 1914, and the amount of the judgment for costs and disbursements upon the appeal from the judgment herein, entered in this Court on June 2nd, 1914, all of which said judgments are to be considered as merged in the judgment so to be entered pursuant to this stipulation.

Dated June 4th, 1914.

BARTON & KAY.
Attorneys for Respondent.
BUTLER & MITCHELL.
Appellant for Appellant.

(Endorsed:) Filed June 4, 1914. I. A. Caswell, Clerk.

362 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 18851.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause June 2, A. D. 1914, it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Illinois Central Railroad Company, Appellant herein the sum and amount of Sixteen Thousand Sixty-one and 73/100 Dollars, ($16,061.73) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 4, A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $—. Printer, $—. Clerk, $—. Acknowledgments, $—. Returns, $—. Postage and Express, $—. Filing Mandate, $—.

Stipulated amount of judgment, Total, $16,061.73.

363 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

[Seal of the Supreme Court, State of Minnesota.]

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul June 4 A. D. 1914.

I. A. CASWELL, *Clerk.*

[Endorsed:] State of Minnesota Supreme Court. Transcript of Judgment. Filed June 4 A. D. 1914. I. A. Caswell, Clerk.

364 No. 18851. State of Minnesota Supreme Court. Fulton M. Skaggs, Respondent, vs. Illinois Central Railroad Company, Appellant. Judgment Roll. Filed June 4, 1914. I. A. Caswell, Clerk.

365 *Authentication of Record.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Fulton M. Skaggs, Plaintiff, vs. Illinois Central Railroad Company, Defendant, and also of the opinion of the court rendered therein, as the same now appears of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in St. Paul, Minnesota, this 25th day of June, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL.
Clerk Supreme Court of Minnesota.

366 STATE OF MINNESOTA:

In Supreme Court, April Term, 1914.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes the above named appellant and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, wherein was drawn in question the construction of a statute of the United States, to-wit: the so-called Employers' Liability Act (Act of Congress April 22nd, 1908, 35 Stat. 65), and the decision was against a right, privilege and immunity specially set up and claimed by appellant under said statute of the United States, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

I.

The Supreme Court of the State of Minnesota erred in affirming the order of the District Court of Ramsey County, Minnesota, denying appellant's motion for a new trial made upon the following ground:

("The Court erred in denying defendant's motion for a new trial made upon the following ground:)

'That the court erred in charging the jury as follows: 'So under
367 that provision of the Federal Statute, if any employee of the railroad company was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant railway company would be liable for that negligence.' ' "

II.

The Supreme Court of the State of Minnesota erred in affirming the order of the District Court of Ramsey County, Minnesota, denying appellant's motion for a new trial made upon the following ground:

("The Court erred in denying defendant's motion for a new trial made upon the following ground:)

'The court erred in charging the jury as follows: 'Did the employee Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company.' ' "

III.

The Supreme Court of the State of Minnesota erred in affirming the order of the District Court of Ramsey County, Minnesota, denying appellant's motion for a new trial made upon the following ground:

"The Court erred in denying defendant's motion for a new trial made upon the following ground:

'That the verdict of the jury is not justified by the evidence.'

IV.

The Supreme Court of the State of Minnesota erred in affirming the order of the District Court of Ramsey County, Minnesota, denying appellant's motion for a new trial made upon the following ground:

"The Court erred in denying defendant's motion for a new trial made upon the following ground:

'The court erred in charging the jury as follows: 'Under the common law in actions such as this, if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and
368 provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury, that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. His negligence, (if he was negligent), would be taken into consideration, and that a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you.' ' "

V.

The Supreme Court of the State of Minnesota erred in affirming the order of the District Court of Ramsey County, Minnesota, denying appellant's motion for a new trial made upon the following ground:

("The Court erred in denying defendant's motion for a new trial made upon the following ground:)

'The court erred in charging the jury as follows: 'If, however, you reach the conclusion from all of the testimony that the employee Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you.' ' "

VI.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

"1. The train was engaged in interstate commerce and concededly the Federal Employers' Liability Act applies. Defendant, however, urges nonliability for the alleged negligence of Buchta in making erroneous statements with reference to facts equally obvious to plaintiff, claiming such to be merely an opinion; and, further, that as they were jointly engaged in uncoupling the engine from the cars and seeing to it that they cleared, Buchta's negligence, if any, was plaintiff's, and not defendant's. These contentions cannot be sustained. Buchta's statement, under the circumstances, was sufficient to warrant the jury in finding that it constituted negligence. It was a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto. Their
369 being jointly engaged in working out the switching operations is of no more significance upon the question of defendant's responsibility for Buchta's negligence than is any other instance of a fellow servant's negligence, for which, under the Federal Act, the master is liable. We hold Buchta's negligence attributable to defendant."

VII.

The Supreme Court of the State of Minnesota erred in holding and decreeing as follows:

"3. The court read to the jury from the Federal Employers' Liability Act, as follows:

'That in all actions hereafter brought against any common carrier by railroad under this act to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.'

The court then charged, after adverting to the common law rule:

'But this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury, that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. His negligence, (if he was negligent), would be taken into consideration, and that a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you.'

And also, in summing up, the following was given:

'If, however, you reach the conclusion from all the testimony that the employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the

injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you.'

Defendant complains of the court's construction of the Federal Act, as indicated by the foregoing excerpts, citing and relying on Norfolk etc. R. Co. v. Earnest, 229 U. S. 114, decided since the trial of the present case. Therein the Supreme Court of the United States considered, for the first time, the correctness of an instruction upon the provision of the Federal Act in question, and criticised a charge similar to the one here involved; it not appearing, however, whether reversal on account thereof would have followed had proper
370 exception been taken. Said the court, at page 121, after approving prior portions of the charge:

"But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. * * * Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it and possibly it was not prejudicial to the defendant.'

In view of this authori-tive pronouncement, it is apparent that the instruction complained of was technically erroneous; but we are satisfied that upon the whole instruction no prejudice to defendant resulted."

VIII.

The Supreme Court of the State of Minnesota erred in affirming the judgment in favor of respondent.

For which errors, the appellant Illinois Central Railroad Company, a corporation, prays that the said judgment of the Supreme Court of Minnesota dated June 4th, 1914, be reversed and a judgment rendered in favor of the appellant Company and for costs.

Dated this 5th day of June, 1914.

ILLINOIS CENTRAL RAILROAD COMPANY,
By BUTLER & MITCHELL, *Its Attorneys.*

371 [Endorsed:] Supreme Court, State of Minnesota. Fulton M. Skaggs, Respondent, v. Illinois Central R. R. Co., Appellant. Assignment of Errors & Prayer for Reversal. Filed Jun- 6, 1914. I. A. Caswell, Clerk.

13—194

372 STATE OF MINNESOTA:

Supreme Court, April Term, 1914.

FULTON M. SKAGGS, Respondent,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of the State of Minnesota in rendering judgment against it in the above entitled case, the appellant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignments of error herewith.

BUTLER & MITCHELL,
Attorneys for Appellant.
624 *Endicott Building, St. Paul, Minnesota.*

STATE OF MINNESOTA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Illinois Central Railroad Company to Fulton M. Skaggs in the sum of Twenty thousand Dollars ($20,000.00); such bond, when approved, to act as a supersedeas.

Dated June 5th, 1914.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

373 [Endorsed:] Supreme Court, State of Minnesota. Fulton M. Skaggs, Respondent, v. Illinois Central R. R. Co., Appellant. Petition for Writ of Error. Filed Jun- 6, 1914. I. A. Caswell, Clerk.

374 STATE OF MINNESOTA:

In Supreme Court, April Term, 1914.

FULTON M. SKAAGS, Respondent and Defendant in Error,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Appellant and Plaintiff in Error.

Bond.

KNOW all men by these presents, that Illinois Central Railroad Company, a corporation organized under the laws of the State of Illinois, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Mary-

land, as surety, are held and firmly bound unto the above named Fulton M. Skaags in the sum of Twenty Thousand Dollars ($20,000), to the payment of which to the said Fulton M. Skaags, his heirs, executors, administrators or assigns, the said principal and surety jointly and severally bind themselves, their successors and assigns.

The condition of this obligation is such that whereas, the above named Illinois Central Railroad Company seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Minnesota.

Now therefore, if the above named Illinois Central Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

In testimony whereof, these presents have been duly ex-
375 ecuted by the respective parties hereto this 4th day of June, 1914.

ILLINOIS CENTRAL RAILROAD COMPANY.
By BUTLER & MITCHELL,
Per GEORGE HOKE, *Its Attorneys.*

In presence of
WILFRED E. RUMBLE.
JOHN B. SANBORN.

UNITED STATES FIDELITY & GUARANTY COMPANY. [SEAL.]
By CHARLES B. COLEMAN,
Its Attorney-in-Fact.

ALEXANDER BARCLAY.
WILFRED E. RUMBLE.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of June, 1914, before me personally appeared George Hoke, a member of the firm of Butler & Mitchell, attorneys for Illinois Central Railroad Company, appellant and plaintiff in error in the above entitled action, who, as one of the attorneys for said company, executed the foregoing instrument for and in behalf of said company, and acknowledged it to be the free act and deed of said company for the uses and purposes therein set forth.

[SEAL.] WILFRED E. RUMBLE.
Notary Public, Ramsey County, Minnesota.

My Commission expires February 26th, 1921.

This bond as to amount is satisfactory.
BARTON & KAY,
Att'ys for Pl'ff.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of June, 1914, before me, a Notary Public within and for said County and State, personally appeared Charles B. Coleman, to me personally known, who being by me duly sworn upon oath did say that he is the Agent and Attorney-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said Charles B. Coleman did acknowledge that he executed the said instrument as the free act and deed of said Company.

[SEAL.] EDITH M. COOKE,
Notary Public, Ramsey County, Minnesota.

My commission expires June 2, 1920.

Bond approved and to act as a supersedeas.

CALVIN L. BROWN,
Chief Justice Supreme Court, Minnesota.

Dated June 5, 1914.

376 [Endorsed:] State of Minnesota, Supreme Court, April Term, 1914. Fulton M. Skaggs, Respondent and Defendant in error, vs. Illinois Central Railroad Company, a corporation, Appellant and Plaintiff in error. Bond on Appeal.
(Endorsed:) Filed June 6, 1914. I. A. Caswell, Clerk.

377 In the Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
FULTON M. SKAGGS, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the Illinois Central Railroad Company, a corporation, plaintiff in error and defendant, and Fulton M. Skaggs, defendant in error and plaintiff, wherein was drawn into question the construction and effect of a certain statute of the United States commonly known as the Federal Employers' Liability

Act (Act of Congress April 22nd, 1908, 35 Stat. 65), and the decision was against the right, privilege and immunity specially set up and claimed by plaintiff in error under and pursuant to said statute of the United States; a manifest error hath happened to the great damage of the said Illinois Central Railroad Company, plaintiff in error, as by its complaint appears. We being willing
378 that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings this day being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this 5th day of June, 1914.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk District Court of the United States,
District of Minnesota.

Allowed June 5th, 1914.

CALVIN L. BROWN,
Chief Justice, Supreme Court of Minnesota.

379 [Endorsed:] In the Supreme Court of the United States. Illinois Central Railroad Company, Plaintiff in Error, v. Fulton M. Skaggs, Defendant in Error. Writ of Error. Filed Jun-6, 1914. I. A. Caswell, Clerk.

380 *Certificate of Lodgment.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on June 6, 1914, in the matter of Fulton M. Skaggs, Respondent, vs. Illinois Central Railroad Company, Appellant, the original bond of which a copy is herein set forth, and copies of the writ of error, one for the plaintiff and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in St. Paul, Minnesota, this June 25, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

381 In the Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
FULTON M. SKAGGS, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Fulton M. Skaggs, Esquire, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein Illinois Central Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Minnesota, this 5th day of June, 1914.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

Attest:
I. A. CASWELL,
Clerk of Supreme Court of Minnesota.

382 ST. PAUL, MINNESOTA, June 5th, 1914.

We, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

BARTON & KAY.

383 [Endorsed:] In the Supreme Court of the United States. Illinois Central Railroad Company, Plaintiff in Error, v. Fulton M. Skaggs, Defendant in Error. Citation. Filed Jun- 6, 1914. I. A. Caswell, Clerk.

384 In the Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
FULTON M. SKAGGS, Defendant in Error.

Pursuant to Rule VIII of the above Court, it is hereby stipulated between the above named parties that the Clerk of the Supreme

Court of the State of Minnesota, in making his return to the above Court upon the writ of error herein, shall transmit to the above Court copies of the following papers contained in the records of the Supreme Court of Minnesota in said case, to-wit:

Summons.
Complaint.
Answer.
Reply.
Settled case.
Motion for new trial.
Order denying motion for new trial.
Notice of appeal from order denying motion for new trial.
Assignment of error in said Court upon appeal from order denying motion for new trial.
Opinion and syllabus upon decision of appeal from order denying motion for new trial.
Judgment roll.
385 Mandate.
Judgment entry of District Court.
Notice of appeal from judgment entry in District Court.
Stipulation for submission of case on appeal from judgment entry in District Court.
Per curiam opinion upon appeal from judgment in District Court.
Judgment roll.
Dated June 30, 1914.

PIERCE BUTLER,
WILLIAM D. MITCHELL,
GEORGE HOKE,
JOHN B. SANBORN,
Attorneys for Plaintiff in Error.
HUMPHREY BARTON,
JOHN H. KAY,
Attorneys for Defendant in Error.

385½ [Endorsed:] 18851. In Supreme Court of United States. Illinois Central Railroad Co., Plaintiff in Error, vs. Fulton M. Skaggs, Defendant in Error. Stipulation. Filed June 30, 1914. I. A. Caswell, Clerk.

386 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix

the seal of said Supreme Court of Minnesota, in the city of St. Paul, this June 25, 1914.

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Costs of transcript $97.25 paid by Illinois Central R. R. Co.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Minn. Supreme Court.

Endorsed on cover: File No. 24,299. Minnesota Supreme Court. Term No. 194. Illinois Central Railroad Company, plaintiff in error, vs. Fulton M. Skaggs. Filed July 6, 1914. File No. 24,299.

Office Supreme Court, U. S.
FILED
DEC 7 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 194

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

FULTON M. SKAGGS,
Defendant in Error.

ERROR TO SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

W. S. HORTON,
BLEWETT LEE,
Attorneys for Plaintiff in Error.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 194

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

FULTON M. SKAGGS,
Defendant in Error.

ERROR TO SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OF FACTS.

This action is for personal injuries sustained by defendant in error at Amboy, Illinois, about 2:00 A. M., January 13, 1913, while employed as a brakeman by plaintiff in error. There was a judgment for $15,000, which was affirmed by the Supreme Court of the State of Minnesota. It is now claimed error was committed by the State Court in its application of the Federal Employers' Liability Act to the facts, both in the conditions of liability and the measure of damages.

The complaint avers, in substance, that both the company and Skaggs were engaged in interstate commerce. Two distinct charges of negligence are made: (1) that

the tracks at Amboy, Illinois, being used at the time, were defective and dangerous and did not provide sufficient, safe and adequate clearance. No attempt was made to sustain that charge; (2) that *the defendant* negligently placed a string of about eight cars on the main track "so close to said passing track and the switch connecting said two tracks that an engine or car being operated from the main line over said switch and onto said passing track would not clear said cars and so close that employes of defendant riding upon the side of said engine, as this plaintiff had to and was doing at said time, would be knocked therefrom by said cars"; and carelessly operated its locomotive over the switch connecting said two tracks, at which time the plaintiff, in the discharge of his duty, was riding upon the side of the locomotive, and "by virtue of the said cars having been so left too close to said switch and passing track plaintiff was knocked from his position on said engine and thrown to the ground." (Rec., 1-3.) The sole negligence attributed to the company is, that the cars were so left upon the main track that there was not sufficient clearance for the engine to pass from that track to the connecting side or passing track.

The record shows that the cars were left in the declared place and that the plaintiff Skaggs, while hanging on the corner of the engine tender, collided therewith. It cannot be pretended that a claim of negligence against the defendant can be rested upon any other act. But it is equally clear that the plaintiff himself was in control of the engine and was the company's agent in handling and so leaving the cars, so that if there was fault on the part of the company, it resulted from Skaggs' failure to properly perform a duty for which he was appointed and in the performance of which he was directly en-

gaged, and from a condition which he knew or should have known.

The clear weight of the evidence is that Skaggs acted alone in leaving the cars in their dangerous position, yet he testified that as he was about to uncouple the engine and leave the cars at that point, the other brakeman suddenly appeared on the opposite side and assisted in the uncoupling and expressed the opinion that there was sufficient clearance. But whether the other brakeman so assisted, it will not be disputed that the placing of the cars was part of Skaggs' duty to the company, and that no other negligence is claimed than that resulting from the nearness of the cars to the switch, for which he was responsible, whether working alone or with another brakeman.

The State Court so construed the Federal Employers' Liability Act as to permit a recovery, notwithstanding the condition which is claimed as the company's negligence was the direct result of the plaintiff's failure to properly perform his duty, provided that in the performance of that duty—the single act of placing the cars—he was assisted by another brakeman, whose opinion of the clearance was equally faulty. The company contends that the Act does not permit a recovery when the condition charged as the company's negligence arose from the plaintiff's own neglect, even though another employe may at the time have participated in the doing of the act or acquiesced in the sufficiency. It is not a question of plaintiff's contributory negligence, but of the company's negligence and its cause. The company cannot be negligent to an employe whose failure of duty and neglect produced the dangerous condition. The instructions to the jury, as will be pointed out, fail to recognize

the participation of Skaggs in producing the situation charged as the company's negligence.

The record also presents the question whether the Employers' Liability Act was properly construed in the court's statement of the measure of damages, under the circumstances shown. The instruction will be later more fully explained.

The error assigned on the question of liability—the necessity for an accurate statement of the liability imposed by the Act—will be better understood from a more detailed explanation of the facts. Fulton M. Skaggs had been in the employment of the company for about four years. He was a bridge man for the first two years—employed in the general work of repairing and building bridges and going from place to place over the system. Afterwards, for about two years, he was a locomotive fireman in the freight switching service, operating in the States of Illinois, Kentucky, and Tennessee. (Rec., 6, 7.) He had been in the service, as brakeman, for ten to fifteen days before the accident, but his first run in that capacity was from Freeport to Clinton, Illinois, January 10, 1913. It was on the return trip from Clinton to Freeport that the accident happened. (Rec., 7.)

The crew consisted of the conductor, Lichtenberger, Rear Brakeman Buchta, Head Brakeman Skaggs (plaintiff), Engineer Schmidt, and the fireman, all of whom testified, except the later, who regularly got his lunch at Amboy, and had left the engine, for that purpose, when the train pulled in, and hence, knew nothing of the facts involved.

The train, on its trip from Clinton to Freeport, reached Amboy, an intermediate station, about 2:00 A. M. It then consisted of fourteen cars and the caboose. There were in it two cars, hereafter called the "Dunbars," to

be left at Amboy, which the members of the crew understood before reaching that station. When the train reached Amboy, the conductor and two brakemen went to the depot to ascertain upon what track the two Dunbars should be placed and what, if any, cars were there to be taken into the train. (Rec., 27.) Upon obtaining that information, Skaggs (the plaintiff) uncoupled the train behind the two Dunbars, and he and Buchta, the other brakeman, rode the string of cars attached to the engine northward, the balance of the train remaining near the depot. (Rec., 10, 28.) It was necessary to run that string of cars along the main track to the most northerly switch, in order that the Dunbars might be backed upon track 4, where they were to remain.

The plaintiff continued with the engine and cars to the northerly switch, but Buchta alighted near Division street, a point part way, and went over to track 4, to line up the switches. The plaintiff turned the main line switch, gave the engineer the signal to back up, and rode the cars in to the passing track, which lay between the main track and track 4.

The conductor, in the meantime, had gone to track 6, to get the numbers of the loads to be taken into the train.

The movement of the engine, in order to properly do the work ,was to first set the two Dunbars on the passing track, then run north and set back on the main track the remaining cars attached to the engine, then bring the light engine again in to the passing track and thence onto track 6, for the cars to be taken into the train before placing the Dunbars on track 4. The record shows that the work was understood by the conductor and brakemen. (Rec., 10, 107-8.)

After the string of cars attached to the engine were pushed into the passing track leading to track 4, the two

Dunbars were uncoupled and left standing while the engine and the remaining cars were again moved north over the main line switch. (Rec., 30.) The plaintiff accompanied them, threw the switch, gave the signal to the engineer to back up, and the engine and cars attached were backed down the main track toward the balance of the train, but not to it. They were stopped on a signal from the plaintiff Skaggs to the engineer, though the former said there was also a signal from near Division street. The plaintiff testified that at that time Buchta, the other brakeman, was somewhere in the yard, but he didn't see him. (Rec., 31.)

There is no substantial difference in the testimony to this point. Skaggs alone controlled the movement of the engine and the attached cars, throwing the main line switch as required and giving the necessary signals. The conductor was part of the time in the depot and part of the time in other parts of the yard, getting the numbers of the cars to be taken out. Buchta had been lining up the other switches for the intended movement, and finally, when the cut of cars were backed down the main track, he got on the car farthest from the engine and rode until it was stopped near Division street. He then, as he testified, went back to the switches leading to the cars to be taken out. (Rec., 137-8.)

Plaintiff did not pretend that either the conductor or other brakeman were near the main line switch or engine up to the time the engine and cut of cars were backed down the main line and stopped after the Dunbars were set out. The variance begins at that point; but it was the position of the cars as they were there stopped which caused plaintiff's injury.

A consideration of the evidence is necessary not only because the plaintiff's statement is against the clear

weight of the testimony, but because of that very fact it was essential that the Act be correctly explained in the instructions, both as to the liability and the measure of damages. An understanding of the facts will show the necessity for correct instructions to the jury.

The substance of Skaggs' testimony, when called by his attorneys as a witness, was, that when the engine and cars were so stopped, he went to the depot to ask the conductor what he gave the signal for, and that then the conductor told him to go back with the engine on track 6, in order to pick up the cars to be taken (Rec., 13), and that he then returned to the engine and started to uncouple it from the cars. He was contradicted in that by the conductor, the engineer and the other brakeman. He further said that when he returned to the standing engine and cars, he attempted to lift the pin for the uncoupling, but it was too tight, and he was about to have the engineer give some slack when Buchta (whose whereabouts were unknown to him until then), on the opposite side of the car, said he would uncouple them, and from his side pulled the pin and said "Go ahead." (Rec., 15.)

Skaggs further testified that when the pin was pulled he started the engine ahead, but didn't know whether the cars would clear for an engine going into the passing track, and asked Buchta, but didn't get an answer which he understood and so stopped the engine and got off and asked again, and Buchta said: "They are clear a mile; go ahead; if we don't get out of here, the sixteen-hour law will catch us before we get into Freeport." (Rec., 15.) Skaggs, at that time, according to his statement, was on the track at the rear of the tender and not more than a car length from the standing car. After receiving Buchta's answer, he said he got back on the engine,

moved it north across the switch, which he then threw for the other track, gave the engineer the back-up signal, stepped on the corner of the tender, and as the engine moved along the connecting or passing track, he collided with the cars left standing on the main track, causing his injury. (Rec., 37-8.)

Buchta testified, in substance, that he was near the main track as the cars were pushed back toward the rest of the train, and got on the car farthest from the engine, and when they stopped on the main track, he went over toward track 4 switch to have the tracks lined up for the arrival of the engine which Skaggs was to cut from the standing cars (Rec., 137-8); that he was not near the engine nor the end of the cars from which it was uncoupled; that Skaggs was to cut off the engine, bring it on the other track, and that he (Buchta) was over there, waiting for him; that he knew nothing of the accident until after receiving a signal from the engineer and hurried to that point. (Rec., 138-9.)

Buchta was corroborated by Schmidt, the engineer, who said that after the movements had been made setting out the two Dunbars, the engine and remaining cars were backed down the main track and stopped upon a signal from the head brakeman, who, at the time, was on the ground near the rear of the engine tender; that immediately the engine was uncoupled from those cars, and he received a signal from the head brakeman to go ahead; that he started ahead and ran over the switch, before stopping; that in that movement the head brakeman was riding on the rear of the tender and, when the engine cleared the switch, he jumped off and gave the stop signal; that after the engine was uncoupled from the cars and signaled ahead it made no stop until the switch was cleared, when the back-up signal was given to him by the head brakeman (Rec., 76-7); that the engine was

started on the connecting track, when the tender scraped the cars which had been left standing on the main track. (Rec., 77.) He at once stopped the engine and, on getting down and finding Skaggs injured, hollered loudly for Buchta, but receiving no reply, went back to the engine and tooted the whistle to signal that he wanted help. (Rec., 78-9.) After giving the signal, he saw Buchta coming around the rear of the cars near Division street; that while the engine was being run north across the switch and backed south onto the passing track, there was no other switchman's light there except that of the head brakeman. (Rec., 81.)

Conductor Lichtenberger was not in the depot, as testified by Skaggs, but over near track 6, getting the numbers of the cars to be taken out (Rec., 110), and was there when he heard the signal that something was wrong. He hurried to the place of the accident, found Skaggs, and inquired: "Where are you hurt, and how did this happen?" Skaggs said: "I cornered that car." (Rec., 111.)

It will be noticed that Skaggs testified that when the engine and cars were stopped on the main track he then went to the depot to inquire about the further work, but the engineer said that after backing the cut of cars down the main track just prior to the accident there was no delay between the stopping of them and the uncoupling of the engine and the signal to move ahead. Skaggs said after the engine was moved about a car length, he stopped it to inquire about the clearance, but the engineer said the engine was not stopped until it crossed the switch, where he was signalled to back up.

Skaggs' statement will best be understood by a recital of a few of the questions and answers on his direct and cross-examination following his declaration that after

stopping the engine he went to the depot to see the conductor:

"Q. Well, you say, now, after getting that order from your conductor you went back to your engine; what did you do then? A. I went back to cut the engine off to go down in the yards, and the rear man was on the opposite side and asked me what I was going to do and where I went, so I told the conductor we wanted to pick up a few down on the same track where we had put in the two cars. He says, 'How many?' I says, 'I don't know,' I says. He was counting the bills when I left, and said he would be over there. And *so I pulled at the pin*, and asked him—I was talking to him during the time, and I didn't get the pin—

Q. Now, what do you mean you didn't get the pin? A. Well, I mean I didn't uncouple, I didn't pull the pin out of the draw-head. * * *

Q. Very well. Did you get it uncoupled? A. I didn't, I—*he cut the air-hose while I was pulling, jerking at the pin.*

Q. *Who uncoupled the air-hose?* A. *The rear man was breaking the air-hose while I was pulling the pin.* * * *

Q. Now, you say the other brakeman was uncoupling the air-hose while you were trying to uncouple the draw-bars? A. Yes sir.

Q. Did he get the air-hose uncoupled? A. He did.

Q. And you say you didn't get the cars uncoupled? A. I told him, I says, 'Look out, I am going to take a little slack and uncouple,' and he says, 'Wait a minute, I can get it over here,' and he did; he pulled the pin himself and he says, 'Go ahead.' And I starts ahead and I didn't know whether those cars were clear or not going over into 4, and I asked him, and I didn't get the right answer to what I thought, and so I stops the engine and gets off the engine and asked him again, and he says, 'They are clear a mile, go ahead, and if we don't get out of here the 16-hour law will catch us before we get into Freeport.' * * *

Q. What did you do then? A. Well, I went ahead and throwed my switch and come back.

Q. What did you do then? A. Well, I caught the rear end of the tank.

Q. On which side? A. Engineer's side." (Rec., 14-16.)

On cross-examination he said:

"Q. Now, let us not get this confused at this time. After you or Buchta—as you testified, Buchta—pulled the pin, you gave the engineer a go-ahead signal to run ahead with the light engine. A. I did.

Q. And the engineer went ahead? A. Started ahead.

Q. Started ahead, that is what I am getting at; how far did he go? A. He didn't go but a little ways until I stopped—gave him a stop signal, and stopped.

Q. You gave the engineer a stop signal, and he stopped the engine? A. Yes sir.

Q. How far, according to your best recollection now, did he go ahead before you stopped him or swung him down? A. Oh, probably a car length.

Q. Where were you then? A. I was on the rear of the engine.

Q. What did you do then? A. What did I do?

Q. Yes. A. Well, I stopped and wanted to know if the cars would clear.

Q. You swung the engine down, it stopped, you got off— A. I did.

Q. —and wanted to know if the cars would clear? A. Yes sir.

Q. You had asked Buchta, as you testified, and you hadn't got a satisfactory answer? A. No sir.

Q. He said they would clear a mile? A. Clear a mile.

Q. *That head car was standing where you had left it when you went down to the station?* A. *Yes, yes sir.*

Q. *It was standing there on the main line in the position in which you yourself had swung the engine down before you went down to the station to talk to the conductor?* A. *The car was standing there, yes sir.*

Q. It was standing there. *That is where you had left it?* A. *That is where I had left it, yes.*

Q. *When you started* ahead, pulled a car length, swung the engine down, what did you do it for? That is to say, why did you swing the engine down at that time? A. I wanted to know whether I would be in the clear or not, coming back there.

Q. Where was the rear end of the tender at that time when you swung down the engine and stopped and got off and asked Buchta if they would clear? A. I was about a car length from the car where it was cut off. * * *

Q. I mean after you had stopped it, after you had asked Buchta, according to your testimony, whether it will clear, and after Buchta had said, 'Yes, it will clear a mile,' you then gave the engineer a go-ahead signal? A. Yes.

Q. Got on the engine and rode up past the switch? A. Yes sir, rode up to the switch.

Q. Just enough to clear? A. Yes sir." (Rec., 37-8.)

When recalled in his own behalf, in rebuttal, he said, referring to the uncoupling of the engine from the cars:

"Q. From which side was Buchta working? A. Well, he was was on the opposite side, the fireman's side, going north.

Q. So that when he made the uncoupling he made it from the fireman's side? A. Yes sir.

Q. And you had been trying to make it on the— A. Engineer's side.

Q. —from the engineer's side. *I believe you said that Buchta broke the air-hose at that time between the engine and the first car?* A. When we first cut off at Amboy?

Q. No, just before you got hurt now. A. *No, I broke the air-hose myself.*

Q. Oh, you broke the air-hose? A. Yes sir."

(Cross-examination):

"Q. Well, you did testify before that Buchta broke the air-hose, didn't you? A. No sir." (Rec., 157.)

When there is considered only the plaintiff's testimony, the following facts stand admitted. He stopped

the cars on the main track where they were when later he collided with them; he either did, or was about to, uncouple the engine from the cars, and would have done so but the apparatus on his side seemed tight and he could not lift the pin. He had not then made inquiry of Buchta, assumed to be on the other side, touching the clearance. He himself uncoupled the air-hose by which the brakes were operated. He ran the engine ahead not more than a car length and got down upon the track behind the tender, to ascertain the clearance. The cars were standing as he had stopped them. He then signalled the engine ahead over the switch, which he threw to the passing track, and as the engine backed down, climbed on the corner of the tender where most exposed to the danger and rode towards the cars the clearance of which he had just stopped to examine, and which he had left at the particular point, and collided with them. If Buchta was present, he did no more than to express an opinion of conditions which were apparent Skaggs himself.

When the record is read, it will be manifest that Buchta was not present when the engine was uncoupled from the cars on the main track, as contended by the plaintiff. The clear weight of the evidence is to the contrary. The variance in plaintiff's testimony gives basis for a belief that it was given in the effort to avoid the impossibility of recovery if the placing of the cars was the plaintiff's sole act. The great weight of the evidence is against him; yet he so testified, and the record will be presented on the basis of his testimony. There should be no recovery, in any event, and especially should the jury have been correctly instructed.

The trial court included in the instructions the following (Rec., 160):

> "There is a federal law, enacted in 1908, and still the law, that every common carrier by railroad, while

engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier. *So under that provision of the federal statute, if any employe of the railroad company was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant railway company would be liable for that negligence.*

The testimony discloses, I think, so that there can be no question about it, that if there was any negligence on the part of the railroad company at this time it was through the negligence of its employe the brakeman, Mr. Buchta. You will recall the testimony as to the acts of the employe, the brakeman Buchta, at the time these cars were set on the main track—the testimony both of Mr. Buchta and of the plaintiff in that regard; and it becomes important for you to consider all of the testimony, that of the plaintiff and of Mr. Buchta and of the other witnesses in the case as to what acts were done, what was said and done by Mr. Buchta at that time. There is a direct conflict of testimony in that regard, as I recall it, which testimony I will not undertake to review but will leave for you to determine from your recollection of that testimony: *Did the employe Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company.* You must determine this question of fact from all of the testimony in the case. If the brakeman Buchta did not fail to exercise that reasonable care which a person of ordinary prudence would have exercised under the same conditions and circumstances, then the defendant railway company would not be guilty of negligence in this case and the plaintiff would not be

entitled to a recovery in any amount in this action, because the plaintiff cannot recover unless the defendant railway company was negligent under the definition of negligence which I have given you.

If you find, then, from all of the testimony in the case that the brakeman Buchta was not negligent and that the railway company was, therefore, not negligent, then your verdict must be for the defendant and you would need to consider no other matters in the case.

If, however, you find from all of the testimony in the case that the defendant was so negligent, then you would need to find for the plaintiff in some amount, and it would be necessary for you to consider the further question of damages in the case."

It will be noted that the instruction in effect assumed the presence of the brakeman Buchta and rendered the defendant liable in some amount if he expressed a negligent opinion on the clearance of the cars without any reference to the plaintiff's conduct in leaving the cars there, his knowledge, or opportunity for knowledge of their position and the danger, the fact that Buchta was in no respect his superior, that his duty to the company was to provide sufficient clearance, and that he rode in on the passing track on the corner of the tender, where most exposed to a danger of his own creation—a danger existing through breach of his duty to the company. The instruction not only makes the defendant guilty of negligence under the act, if the brakeman Buchta did anything considered by the jury negligent even the expression of an erroneous opinion, notwithstanding the placing of the cars was an act for which Skaggs was responsible to the company and in which he was directly engaged, but also it ignores the provisions of the law under which Skaggs, in riding on the corner of the tender, assumed the risk of a position of the cars concerning which he had knowledge, or reasonable opportunity to have.

On the question of damages the court instructed (p. 161):

"Should you find the defendant negligent, and therefore liable in damages to the plaintiff, then you would consider the question as to the amount of damages which the plaintiff is entitled to recover, and you would find—if you find him entitled to any damages at all—such damages as will fairly and justly compensate him for the injuries sustained by him. And you should take into consideration the mental and physical suffering endured by him by reason of the injury, his loss of time because of the injury, the impairment of his ability to earn wages by his employment, take into consideration the character of the injury, its permanency, and, after considering all of those matters, determine what amount, in your judgment, would fairly and justly compensate the plaintiff for the injury sustained.

The federal law to which I have called your attention contains this further provision,—and I quote from the law: 'That in all actions hereafter brought against any common carrier by railroad under this act to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.' That rule changes the rule in Minnesota courts with reference to the effect of contributory negligence. Under the common law in actions such as this if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. *His negligence (if he was negligent) would be taken into consideration, and that a comparative amount, depending upon the ratio of his negligence to the negligence of*

the defendant, would be considered by you. The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame. So, besides determining whether the defendant, under the instructions which I have given you, was negligent, you are further to determine whether the plaintiff was himself negligent and whether that negligence (if you find there was such on the part of the plaintiff) contributed to the cause of this injury, and then if you find that he was negligent in any degree you will apply the rule as I have stated it to you under the federal statute to which I have called your attention."

And again, as follows (p. 163):

"In determining the question of damages—if you reach that point in the case, if you believe that the plaintiff is, under the testimony and under the instructions which I have given you, entitled to recover anything at all in this action—you will determine the amount which he is entitled to recover by the exercise of your very best judgment, and *if you find that he is entitled to recover at all, give him that amount, find in your verdict such amount as you believe will fairly and justly compensate him for the injuries which he has sustained.*

I wish, only by way of review, to again state to you that the right of the plaintiff to recover in this action depends upon whether the defendant was negligent. If the defendant was not negligent

through the acts of its employe, the brakeman Buchta, if this employe Mr. Buchta did not fail to exercise the reasonable and ordinary care which an ordinarily prudent man would have exercised under the same circumstances, then the defendant is not liable in any amount in this action and the plaintiff cannot recover. If, however, you reach the conclusion from all of the testimony that the employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, *in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you.*"

It will be noted that after stating the elements which should enter into the ascertainment of the total damages, a clause of the federal law was quoted and it was defined that under the law "his negligence (if he was negligent) would be taken *into consideration,* and that a comparative amount, depending upon the ratio *of his negligence to the negligence of the defendant, would be considered*" (Rec., 161-2); that later, after stating that erroneous rule, the court further instructed the jury that "if you find that he is entitled to recover at all, give him that amount, find in your verdict such amount *as you believe will fairly and justy compensate him* for the injuries which he has sustained" (Rec., 163); and then, by way of a general summary, after reviewing the question of negligence, stated that if the plaintiff was entitled to recover, he should recover such sum as would fairly and justly compensate him for the injuries sustained, unless he was himself guilty of contributory negligence, "in which event you *would take into consideration his negligence in comparison with the negligence of the defend-*

ant and reach your conclusion as to the amount under the instructions" given.

The alleged errors of the trial court in its instructions were duly presented in motions for a new trial (Rec., 168-9) and in an assignment of errors on appeal from that court to the Supreme Court of Minnesota. (Rec., 173-6.) The State Supreme Court, nevertheless, sustained the instructions, though holding that the part thereof relating to damages was not technically correct. (Rec., 179-80.)

The questions of liability and damages are controlled by the true construction of the Federal Employers' Liability Act. The question is presented whether, under that Act, a condition—such as the nearness of certain cars to a sidetrack—should be submitted as negligence of the company when it resulted from the plaintiff's failure to properly perform his duty, notwithstanding another employe concurred in the result—whether, in such a case, a basis of absolute liability should be made contingent only on Buchta's negligence, notwithstanding the plaintiff participated in the work and knew, or had opportunity to know, the exact situation and was responsible to the company for it. The instructions permitted a liability without regard to his knowledge or opportunity for knowledge and assumption of the risk in riding as he did, exposed to the danger therefrom. The record also raises the question of the proper rule of damages under the Act.

Errors Relied Upon.

In order that the questions of liability and damages may be presented, errors are assigned, which appear in full on pages 190 to 193 of the record. They include the following:

(1) The Supreme Court of Minnesota erred in affirming the order of the District Court of Ramsey County, denying appellant's motion for a new trial, because of that court's error in instructing the jury that:

> "So under that provision of the Federal Statute, if any employe of the railroad company was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant railway company would be liable for that negligence." (Rec., 190.)

(2) The Supreme Court of Minnesota erred in sustaining the act of the lower court in charging the jury:

> "Did the employe Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company." (Rec., 190.)

(3) The Supreme Court of the State erred in affirming the order of the District Court of Ramsey County, denying the company's motion for a new trial upon the ground that the verdict was not justified by the evidence. (Rec., 191.)

(4) The Supreme Court erred in approving the action of the lower court in charging the jury that:

> "Under the common law in actions such as this, if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury, that he will, notwithstanding that, be entitled to recover a proportionate amount of the

total injury sustained. His negligence (if he was negligent), would be taken into consideration, and that a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you." (Rec., 191.)

(5) The Supreme Court erred in affirming the action of the trial court in charging the jury that:

"If, however, you reach the conclusion from all of the testimony that the employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you." (Rec., 191.)

(6) The Supreme Court erred in holding that:

"Buchta's statement, under the circumstances, was sufficient to warrant the jury in finding that it constituted negligence. It was a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto. Their being jointly engaged in working out the switching operations is of no more significance upon the question of defendant's responsibility for Buchta's negligence than is any other instance of a fellow servant's negligence, for which, under the Federal Act, the master is liable. We hold Buchta's negligence attributable to defendant." (Rec., 192.)

(7) The Supreme Court of the State erred in affirming the judgment of the court below. (Rec., 193.)

(8) The Supreme Court of the State erred in holding that notwithstanding the error in the instruction relating to damages, the judgment should be affirmed. (Rec., 192-3.)

BRIEF.

I.

THE STATE COURT ERRONEOUSLY APPLIED THE FEDERAL EMPLOYERS' LIABILITY ACT TO THE FACTS.

The Federal Act does not impose a liability when either there is no negligence for which the company is answerable to the person injured, or the conditions of danger are known or should be known to him. The court's instructions ignored both these essentials and permitted a verdict upon the single condition that the other brakeman—Buchta—was negligent in his expressed opinion of the clearance; thus ignoring not only Skaggs' direct control of the situation and his responsibility to the company for the proper switching of the cars, but also his knowledge, or opportunity for knowledge, of the danger and voluntary exposure thereto.

The accepted definition of negligence is that:

> "In every case involving negligence there are necessarily three elements to its existence; (1) the existence of a duty on the part of defendant to protect plaintiff from the injury; (2) failure of defendant to perform that duty; and (3) injury to plaintiff from such failure of defendant. When these elements are brought together they unitedly constitute actionable negligence and the absence of any one of these elements renders the complaint bad or the evidence insufficient."
>
> Cyclopedia Law and Procedure, Vol. 29, pp. 419-20.
>
> Thompson on Negligence, Vol. 1, p. 4.

What were the legal duties under plaintiff's version of the facts? He was in charge of the movement of the

engine and cars under an employment by the defendant whereby he undertook to carefully and properly perform the service. He owed it the duty to so place the cars on the main track that the subsequent movements of the engine could be made. He was directly and immediately participating in the work. He stopped the cars at a given point, uncoupled the air-hose, attempted to lift the coupling pin, and, when uncoupled, signalled the engine ahead. When it had moved not more than a car length, he stopped it and stepped upon the track behind the tender "to know whether he was in the clear." (Rec., 38.) He asked the other brakeman, who he claims was there, and was told: "It will clear a mile." Could he, while immediately engaged in and responsible for the work, so relieve himself from responsibility and render the company negligent because of the opinion claimed to have been thus given by the other brakeman? The company did not owe him the legal duty to furnish an employe to advise whether cars were a safe distance from the switch. He undertook, when present and directly engaged in the particular work, to determine such facts both for himself and the company. The fact that in doing so he received and adopted the opinion of another brakeman neither made the position of the car any the less his act nor changed the responsibility of the parties. It was still through his act and in the performance of his duty to the company that the cars were left too near.

The State Supreme Court held that if Buchta was negligent, that is, gave an erroneous or negligent opinion, then, under the facts, the company was negligent, without reference to the cause of the injury or to Skaggs' participation in producing it. The cause of the injury averred in the complaint is the position of the car too near the switch. No other negligence is claimed against the company. Who left it there? What duty did the

company owe to Skaggs in that respect? It had employed the plaintiff, who presumably represented himself competent, to do the work. The fact, if proven, that another employe was assisting him and acquiesced in the sufficiency of the clearance or gave an erroneous opinion concerning it, does not change the fact that the car was left too close, through plaintiff's fault and in breach of his duty to the company. It is not the case of another employe doing a distinct part of the work and doing it negligently, whereby the plaintiff was injured, but of the plaintiff's performance of his own duty and accepting the advice of the other as a detail thereof.

Suppose, for illustration, two employes appointed to build a scaffold in connection with an interstate structure. When done, one asks the other whether it is strong enough for the intended burden, and being told that it is, goes upon it and is injured because of its weakness. Surely, he cannot recover, notwithstanding the opinion of his associate, because the defendant was not negligent as to him. It had delegated to him and the other the safe construction and the failure was his fault and a breach of his duty, even though the other was also to blame. The employer had not agreed, nor was it in duty bound to furnish the advice as to a condition which the employee represented or assumed himself competent to determine. The weakness of the scaffold was his act, even though it was also the act of the other.

The State Supreme Court said that "if plaintiff's story is true, Buchta was in a position to know about the clearance, while plaintiff was not"; but the record does not so show. The plaintiff had been working over those very tracks just before the accident; he stopped the cars at a given point; he uncoupled the engine before he made any inquiry; he recognized his duty and the situation

when he stopped the engine and got down on the track in the rear of the tender to satisfy himself. Buchta, according to plaintiff's story, was at the end of the standing car, Skaggs was on the main track in the rear of the tender, less than a car length distant. The situation, including the nearness of the tracks, was as plainly before him as before Skaggs. So the record, under the plaintiff's version, will not sustain the court's reasoning or finding that Skaggs was not in position to know.

Moreover, it should not be a question of the degree of knowledge or opportunity between Skaggs and Buchta, because as between the former and the company, the position of the car was his act. The fact that he sought Buchta's opinion for his own guidance does not affect the conclusion that the thing he did after getting the opinion was his act; and it was that act, that failure in his duty to the company, which caused his injury. The company did not negligently leave the car there, whatever Buchta said, but it was left as the result of Skaggs' own conclusion after getting on the track and after receiving the opinion and with the facts and conditions before him. The company cannot be negligent to him for a condition due to his failure to properly perform his duty.

Ellis' Admr. v. *L. H. & St. L. Ry.*, 155 Ky., 745 (160 S. W., 512, 513).

But if the State Supreme Court is right in making the liability depend on the degree of opportunity to know the conditions or surroundings, the instruction is bad, because it did not make the liability so depend. The jury, under the instruction, must find the company liable, if Buchta was negligent, without any reference to the opportunity of Skaggs to know and his duty to decide. If the opportunity for knowledge is a factor, the jury should

have been instructed that Buchta's act rendered the company liable, provided Skaggs did not know, or have equal opportunity to know, the facts, and did not act upon, or was not in duty bound to act upon, his own knowledge.

If, under the circumstances in this record, the negligent placing of the car can in any degree be attributed to Buchta, and, through him, to the company, it must be because, notwithstanding his negligence, Skaggs (the plaintiff) did not know the condition, was not directly and immediately engaged in the very act of leaving the car, and, though standing upon the main track, with his lantern, had no opportunity to note the location of the other track, the rails of which must have been nearer to him than to Buchta; but those are questions of fact which the jury should have been directed to determine before placing the negligence upon the company,—the instruction should have explained the effect of Skaggs' knowledge and participation in the placing of the car. The court, however, construed the Liability Act as making the defendant negligent and the liability to depend on the single condition of Buchta's negligence, and treated Skaggs' conduct as mere contributory negligence, ignoring both assumption of risk and the essential fact that defendant's negligence cannot be predicated upon a condition the responsibility for which and the direct doing of which rested upon and was the act of the plaintiff.

The facts here are unlike those in *Grand Trunk Western Railway Company* v. *Lindsay*, 233 U. S., 42, but it illustrates the error of the State Court. There, there were two distinct acts of negligence, one by the company in permitting the coupling apparatus to become defective—a condition with which the plaintiff had no connection or responsibility; the other the act of the plaintiff in giving a signal to the engineer to come ahead.

The injury resulted from the defective coupling, in connection with the negligent signal. The company was negligent because of the defective coupling, and it was held liable because the contributory negligence was not a defense. It was not a case where the defect in the coupling was caused by the plaintiff's own immediate act, as is the present case. This court there said (p. 49):

> "But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence, that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the Safety Appliance Act and by the contributing negligence of the switchman in going between the cars."

The distinction is marked. There the defect in the coupler was the defendant's act, independent of any duty of the plaintiff. Here the position of the car was in violation of the plaintiff's duty and responsibility and was a result in which he directly and immediately participated. It might have been otherwise if he had taken no part in the stopping of the car, or its uncoupling, or in ascertaining its clearance, but had confined his work merely to the throwing of the switch, whereby the sole responsibility for the car's position rested on the other brakeman. If, under that condition, he had climbed on the side of the tender and negligently failed to see the nearness of the car as the engine moved down, the case would be one of contributory negligence—two distinct acts of negligence, one that of Buchta in leaving the car at the point, the other of Skaggs in negligently failing to keep a lookout for obstructions. But that is not the fact or point for consideration.

ASSUMPTION OF RISK.

If it should be held, notwithstanding the foregoing suggestions, that the court correctly construed the law and that Skaggs' participation in the act—the placing of the car—which is charged as the company's negligence, does not relieve the company from the charge of negligence because of Buchta's claimed erroneous opinion, there still remains the question of assumption of risk. The court in its instructions stated a rule of complete liability under the law; and notwithstanding the evidence of Skaggs' immediate participation in the placing of the car and his opportunity to know its nearness to the other track, made that liability depend solely on the negligence of Buchta, without reference to Skaggs' knowledge or opportunity to know. The Federal Act, however, does not render the company liable where the employe knew the situation and danger, or had reasonable opportunity to know.

Seaboard Air Line v. *Horton*, 233 U. S., 492.

Schweig v. *C. M. & St. P. Ry. Co.* (C. C. A.), 216 Fed., 750.

Boldt v. *Pennsylvania R. R.* (C. C. A.), 218 Fed., 367.

Columbia & P. S. Ry. v. *Sauter* (C. C. A.), 223 Fed., 604.

These cases construe the Federal Act as including in its conditions of liability the common law rule of assumption of risk. In *Seaboard Air Line R. R.* v. *Horton*, 233 U. S., 492, this court, in considering the meaning of the Act, said (p. 507):

> "But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an applicance, excluding the common law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common law rule."

It is part of the common law rule that conditions and risks arising out of the failure of the employer to exercise due care in providing a safe place to work will be assumed by the employer when he is aware of them, or, by ordinary observation, should have been.

Seaboard Air Line R. R. v. *Horton*, 233 U. S., 492.

Union Pacific Ry. v. *O'Brien*, 161 U. S., 451, 458.

Choctaw, O., etc., R. R. v. *McDade*, 191 U. S., 64, 68.

Choctaw, O. & G. R. R. v. *Holloway*, 191 U. S., 334, 337-8.

In *Seaboard Air Line* v. *Horton*, 233 U. S., 492, the rule is expressed as follows (p. 504):

> "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, *unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*"

It cannot be said, under the facts in this case, that the plaintiff did not have opportunity to know whether it was safe for him to ride into the passing track hanging on the corner of the tender. He knew, or should have known, the exact position of the car and its nearness to that track. At least, whether he knew, or should have known, were facts which the jury should have been directed to determine before imposing liability upon the company. Nevertheless, the court instructed (Rec., 190):

> "Did the employe Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordi-

nary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company."

And, also (Rec., 191):

"*If, however, you reach the conclusion from all of the testimony that the employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him*, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you."

The Supreme Court so construed the Federal Act as to sustain that instruction; but it states a complete right to recover, conditioned solely upon the position of the car through the negligence of Buchta, without in any way considering the plaintiff's participation in the work, his knowledge of the car's location, or his opportunity therefor. It is submitted that, at the very utmost, under the facts here proven, it was error for the court to state a complete ground of liability or basis of recovery, and ignore assumption of risk in so doing.

II.

THE STATE COURT ERRONEOUSLY CONSTRUED THE PART OF THE FEDERAL EMPLOYERS' LIABILITY ACT REGULATING THE DAMAGES AS APPLIED TO THE FACTS SHOWN IN THIS RECORD.

It is clear from the version of the facts given by the plaintiff that he was, in any event, guilty of negligence in leaving the car too near the switch and failing to know its position and in riding on the corner of the tender, where he was most exposed thereto. The case made is

one which entitles the company to have the rule of damages correctly stated; yet, after quoting from the law part of Section 3, the jury was instructed (Rec., 161-2):

"Under the common law in actions such as this if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. *His negligence* (if he was negligent) *would be taken into consideration, and that a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you.*"

And as a summary of the rule of damages, the jury were further instructed (Rec., 163):

"If, however, you reach the conclusion from all of the testimony that the employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event *you would take into consideration* his negligence in comparison with the negligence of the defendant *and reach your conclusion* as to the amount *under the instructions which I have given you.*"

The court's interpretation of Section 3 of the Federal Employers' Liability Act was erroneous not only in the specification of the proportion of the full damages to be awarded in the event of contributory negligence, but also in substantially leaving to the jury whether any reduction should be made because of such negligence. The language of the law is that "the damages *shall be* diminished by the jury in proportion to the amount of negli-

gence attributable to such employe," which this court has construed to mean that "the damages allowed shall bear the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both." The amount recovered is not made to depend "upon the ratio of his negligence to the negligence of the defendant," but upon the ratio between the company's negligence and the total negligence of both parties. This proportion or ratio is not merely to be "considered" by the jury in arriving at a verdict, but *must be* taken as the limit of the recovery.

Seaboard Air Line Railway v. *Tilghman*, 237 U. S., 499, 501.

Norfolk & Western R. R. v. *Earnest*, 229 U. S., 114.

In the case of *Norfolk & Western R. R.* v. *Earnest*, 229 U. S., 114, an instruction was condemned which stated that "the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant" (p. 120)—substantially the ratio specified in the present case. The amount of recovery permitted under the condition of contributory negligence is here an important element and should have been correctly stated to the jury. Instead, however, the court stated a ratio or proportion contrary to the clear meaning of the Act, as this court has determined.

But not only did the court state an erroneous proportion, but it furthermore practically left the effect of the contributory negligence to the jury. The Act says that in the event of contributory negligence "the damages *shall be diminished* by the jury in proportion," etc. The court here told the jury, in substance, that if Skaggs was negligent, his negligence would be taken "into consid-

eration," and that a comparative amount, depending upon the incorrect ratio, "would be considered by you." Then, in the part of the instruction summarizing the charge, the jury were told that in the event of his contributory negligence (Rec., 163), "you would take *into consideration*" his negligence in comparison with the negligence of the defendant, "and reach your conclusion as to the amount under the instructions which I have given you." The fixed measure of the statute was not only misstated, but it was given to the jury only as a circumstance which they might consider—as a factor merely to be taken "into consideration." The law is, that they must not only consider it, but that they must follow it.

Ths case of *Seaboard Air Line Railway* v. *Tilghman*, 237 U. S., 499, explains the defect. There the jury were told that if there was concurring negligence, they should determine the full amount of damages sustained and "then deduct from that whatever amount you think would be proper for the contributory negligence." The court said (p. 501):

> "No reference was made to the rule of proportion specified in the statute or to the occasion for contrasting the negligence of the employe with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made and the jury should have been advised of that rule *and its controlling force.*"

Here the court not only misstated the proportion, but so expressed the matter to the jury as to virtually leave

it to them to fix the damages after giving consideration to the different elements. They were told that the comparison should be "considered" by them, but were not told that it must be followed in computing the damages.

The State Supreme Court, in its opinion, admitted the error in the instruction, but, as is too common, dismissed it with the expression that no prejudice resulted. The court's language, referring to the case of *Norfolk & Western Ry.* v. *Earnest*, 229 U. S., 114, is (Rec., 180):

> "In view of this authoritative pronouncement, it is apparent that the instruction complained of was technically erroneous; but we are satisfied that upon the whole instruction no prejudice to defendant resulted."

The plaintiff was so intimately involved in the placing of the car charged as the negligence which caused his injury, and in exposing himself directly to the danger therefrom, that his conduct, his negligence, cannot be so brushed aside and ignored, practically, in the jury's charge. The Federal Act, as applied to the present facts, requires a substantially diminished damage, if in any amount recoverable, and should have been correctly interpreted to the jury. The court's expressed reason for failure to give effect to the admitted error is, that upon the whole instruction no prejudice to defendant resulted. Will the charge as a whole admit that conclusion?

The court, in charging the jury, came to the question of damages, and said (Rec., 161):

> "Should you find the defendant negligent, and therefore liable in damages to the plaintiff, then you would consider the question as to the amount of damages which the plaintiff is entitled to recover and you would find—if you find him entitled to any damages at all—such damages as will fairly and justly compensate him for the injuries sustained by him. And you should take into consideration the mental and physical suffering endured by him by reason

of the injury, his loss of time because of the injury, the impairment of his ability to earn wages by his employment, take into consideration the character of the injury, its permanency, and, after considering all of those matters, determine what amount, in your judgment, would fairly and justly compensate the plaintiff for the injury sustained."

As that paragraph stands, it is a complete rule to be followed by the jury in fixing the amount of the verdict. It is expressed as the amount of damages "which the plaintiff is entitled to recover."

Then, having so stated "the amount of damages which plaintiff is entitled to recover," the instruction calls attention to, and quotes from, Section 3 of the Federal Employers' Liability Act, following with the erroneous statement of the method of computing damages where there is concurring negligence, already discussed. Then there is a reference to the burden of proof, the weight to be given to the testimony of witnesses, and, taking up again the question of damages, the instruction reads (Rec., 163):

> "In determining the question of damages—if you reach that point in the case, if you believe that the plaintiff is, under the testimony and under the instructions which I have given you, entitled to recover anything at all in this action—you will determine the amount which he is entitled to recover by the exercise of your very best judgment, *and if you find that he is entitled to recover at all, give him that amount, find in your verdict such amount as you believe will fairly and justly compensate him for the injuries which he has sustained.*"

What more misleading charge can be given under the facts developed by the trial? The erroneous rule relating to contributory negligence had been stated, and following it is the direct instruction to determine "the amount which he is entitled to recover by the exercise of your very best judgment," and, also, that if they find

him entitled to recover at all, "give him that amount, *find in your verdict* such amount as you believe will fairly and justly compensate him for the injuries which he has sustained." What could or would a jury do, under such language? Having been told in the earlier part of the charge that they were only required to "consider" the proportion erroneously stated, they were then directed to give him "in your verdict such amount as you believe will fairly and justly compensate him for the injuries which he has sustained." It must be noted that the court was not there discussing the measure of full damages, but the amount which should be found "in your verdict."

The court followed that paragraph of his charge with a further reference to the conditions under which the plaintiff might recover and to Buchta's negligence, and then said that if the plaintiff was guilty of contributory negligence, the jury "would take *into consideration* his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you." What instructions? The jury had just been told that they should find "in your verdict" the amount which would fairly and justly compensate him,—a charge wholly ignoring the statute and the rule for the apportionment of damages in cases of contributory negligence.

The instruction on damages as a whole is wrong. If the erroneous statement of the rule relating to contributory negligence is taken out, it remains grossly defective. In such a case as this, where the negligence of the plaintiff is so conspicuous, the jury should not be told, under the Federal Act, that if they find the plaintiff entitled to recover at all they shall give him such amount as they "believe will fairly and justly compensate him for the

injuries which he has sustained." Where there is contributory negligence so gross as in this instance, a rule of damages and statement of the right to recover under the Act which ignores the reduction required by it, is not only erroneous, but is prejudicial.

Inasmuch as the State court not only misconstrued and misapplied the Federal Employers' Liability Act, in its bearing upon the negligence charged against and sought to be imputed to the company, but also in its construction of the amount of damages to be recovered where the record discloses contributory negligence, it is submitted that the judgment of the State Court should be reversed.

Respectfully,

W. S. HORTON,
BLEWETT LEE,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, A. D. 1915.

No. 194

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

FULTON M. SKAGGS,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

W. S. HORTON,
BLEWETT LEE,
For Plaintiff in Error.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

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The liability is based upon the Federal Employers' Liability Act. The negligence charged is that the company, plaintiff in error, left cars standing upon the main track too close to the switch, in consequence of which Skaggs, the defendant in error, while hanging upon the corner of the engine tender, collided with them. The proof is that Skaggs, as head brakeman, was instrumental in leaving the cars at the particular place and immediately participated in so doing. He contended, though contrary to all the other testimony, that another brakeman (Buchta) was also present when the engine was un-

coupled from the cars and expressed the opinion that there was sufficient clearance.

The State Court, in instructing the jury on the facts necessary to constitute a liability under the Federal Act, made it depend solely upon whether the cars were left there through Buchta's negligence, ignoring Skaggs' immediate presence and direct participation in the separation of the engine from the cars and their being left at that place. The company contends that inasmuch as Skaggs directly participated in uncoupling the engine from the cars and leaving them at the place, the company was not negligent as to him, because it did not owe him the duty to see that he did his work properly, or to furnish another employe to advise whether his work was properly done; that even though another employe jointly participated with Skaggs, yet, as between him and the company, it was none the less his act, for which there can be no liability.

Ellis' Admr. v. *L. H. & St. L. Ry.*, 155 Ky., 745 (160 S. W., 512, 513).
Thompson on Negligence, Sec. 3879.
Perigo v. *Indianapolis Brewing Co.* (Ind.), 52 N. E., 462.
McKay v. *Hand*, 168 Mass., 270.
Callaway v. *Allen*, 64 Fed., 297.
Chicago Edison Co. v. *Davis*, 195 Ill., 31.

It is essential to liability that there shall exist a duty on the part of the company to protect plaintiff from the particular cause of injury.

Cycl. Law & Procedure, Vol. 29, pp. 419-20.
Thompson on Negligence, Vol. 1, p. 4.

But the company did not owe the duty to Skaggs to see that he left the cars with sufficient clearance, or that

he, acting jointly with another, did so, unless the proof at least shows the other in control and exercising his authority.

The trial court instructed that the plaintiff below was entitled to recover if Buchta, the other brakeman, was negligent, omitting in every respect from their consideration Skaggs' participation in the act and opportunity to know the condition. In thus stating a complete right to recover, it was essential that all the conditions shown by the undisputed testimony be included.

Pennock et al. v. *Dialogue*, 2 Peters, 1, 15.
Clarke v. *Courtney*, 5 Peters, 319, 354.
Greenleaf v. *Birth*, 9 Peters, 292, 299.

The trial court also misdirected the jury on the proper measure of damages where there was proof of contributory negligence. The instruction given not only misstated the proper rule for the reduction of the damages, but also omitted all requirement that the rule stated should be followed, instructing only that the jury should take such fact "into consideration." The instruction was error, under the cases of

Norfolk & Western R. R. v. *Earnest*, 229 U. S., 114.
Seaboard Air Line v. *Tilghman*, 237 U. S., 499.

These cases require not only that the rule for determining the amount of the deduction to be made shall be correctly stated, but also that its controlling force be explained to the jury.

The State Supreme Court admitted the error in the part of the instruction on damages, but concluded that the company was not prejudiced thereby; but when the instruction on damages as a whole is read, it will be found that the court in no way relieved the effect of the error,

but on the contrary, in another paragraph, instructed the jury that (Rec., 163) if they found the plaintiff entitled to recover, they should find *in their verdict* such amount as would fairly compensate him for the injuries sustained, omitting in that direct command all reference to contributory negligence or any rule of reduction. That part of the instruction was inconsistent with the part relating to the effect of contributory negligence and hence erroneous.

Bank v. *New England Bank,* 6 How., 212, 226.
District Columbia v. *McElligott,* 117 U. S., 621, 630.

Exceptions were taken and errors assigned in the State Court in accordance with the method prescribed by the statutes of the state as construed by the courts. It is not required that for such an error an exception be taken at the time the instruction is given. It is sufficient to raise it in the motion for new trial.

Section 7830, General Statutes of Minnesota, 1913.
Sassen v. *Haegle,* 125 Minn., 441 (107 N. W., 445).

The cases from the Minnesota court, cited in the brief for defendant in error as requiring an exception to be taken at the trial, have no application. The cases of *State* v. *Zempel,* 103 Minn., 428, 429; *Waligora* v. *St. Paul Foundry Co.,* 107 Minn., 554, 559, and *Smith* v. *Great Northern Ry.,* 153 N. W., 513, so cited, have no application, since the rule of those cases, as explained by the court, is intended to apply only to errors which are apparently the result of oversight or inadvertence,

and not to a fundamental error in the statement of the measure of damages or the conditions of liability.

Sassen v. *Haegle*, 125 Minn., 441 (107 N. W., 445).

Since the exceptions were taken in accordance with the state practice, and the questions were considered by the state tribunal, this court will take jurisdiction of them.

Mallinckrodt, etc., Works v. *St. Louis*, 238 U. S., 41, 49.

North Carolina R. R. v. *Zachary*, 232 U. S., 248, 257.

L. & N. R. R. v. *Woodford*, 234 U. S., 46.

St. Louis I. M. & S. Ry. v. *Taylor*, 210 U. S., 281, 293.

Seaboard Air Line v. *Horton*, 233 U. S., 492, 499.

St. Louis, I. M. & S. Ry. v. *McWhirter*, 229 U. S., 265.

T. St. L. & W. R. R. v. *Slavin*, 236 U. S., 454, 457.

Southern Railway v. *Crockett*, 234 U. S., 725, 730.

Seaboard Air Line v. *Duvall*, 225 U. S., 477, 487.

The brief for defendant in error attempts to show that the errors assigned depend for their solution upon disputed issues of fact decided by the State Court, and that hence, this court should not take jurisdiction, under the rule in *Dower* v. *Richards*, 151 U. S., 658; *Bartlett* v. *Lockwood*, 160 U. S., 357; *Minneapolis, St. P., etc., Railway* v. *Popplar*, 237 U. S., 369; and other cases. But they misconceive the error assigned. The court is not being asked to determine whether in fact Buchta was present at the uncoupling of the engine from the cars, or whether he expressed an erroneous opinion touching

the clearance, but whether, admitting his presence, the uncontradicted proof that Skaggs was also present, directly participating in every detail with which Buchta was connected could not be ignored by the court in stating the rule of the company's liability. It is not a question of the weight of the testimony, but whether the jury was misdirected under the undisputed facts—a pure question of law.

Likewise, on the assumption of risk and Skaggs' knowledge of the situation. While the rule may be that in case of non-instruction, a defeated party may not complain, unless he requested an instruction on the subject, yet this is not the case of non-instruction, but of misinstruction, the trial court having stated the rule for a complete liability, ignoring essential facts in the record without dispute.

Pennock v. *Dialogue*, 2 Peters, 1, 15.

In the case of misdirection it is not necessary that a proper instruction should have been requested.

Allis v. *Leonard*, 58 N. Y., 288.

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 194.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

FULTON M. BRADEN,
Defendant in Error.

Error to the Supreme Court of the State of Minnesota.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

It is claimed in plaintiff in error's brief that defendant in error was solely responsible for the cars on the main line having been left where they did not clear the engine moving on the passing track at the time he was injured, and if not solely responsible therefor, that then the leaving of said cars in said place was the joint act of defend-

ant in error and his associate brakeman Buchta, and that in either event, he cannot recover. It is also claimed that the weight of the evidence is against defendant in error, and that he assumed the risk of injury from said cars.

While it seems to us that these questions are solely evidenciary matters, not involving any Federal question, and we shall so contend, nevertheless we believe the same to be unfounded in fact and will endeavor to so show.

Facts.

We find it necessary to make a statement of facts, so far as said claims of plaintiff in error are concerned, for the reason that the statement of facts in its brief is not accurate nor complete.

Defendant in error was an inexperienced person in the performance of the duties of a brakeman and was unacquainted with the railway tracks at Amboy, the place where he was injured. He was not acquainted with any of the members of the train crew prior to the trip on which he was injured. (Rec. 7-11.)

The accident happened at about two o'clock in the morning. It was a very cold, dark and windy night. (Rec. 9 and 82.)

Plaintiff was head brakeman because of his having less experience than Buchta, the rear brakeman. Rec. 153.) Buchta had about seven years' experience as a brakeman, working in and through the railway yards at Amboy, and was familiar with said yards. (Rec. 146.) In general, defendant in error performed his duties at the head end of the train and received signals and orders from the conductor, or the rear brakeman, Buchta.

After the train arrived at Amboy, the place of the accident, and came to a stop, there were four movements of the engine with cars attached to it before defendant in error was injured, as follows: The train was cut in two parts behind either the ninth or twelfth car from engine, and the engine then moved north with the said nine or twelve cars attached to it until they passed a switch connecting the passing track with the main line; it then moved south over said switch and upon the passing track and came to a stop upon a signal given by Buchta and repeated by Skaggs, the defendant in error, and the two cars farthest from the engine were then cut off and the engine again moved north with the remaining cars and passed over said switch onto the main line *and then moved south on the main line, with said cars, till it was stopped by a signal given by the conductor and repeated by Skaggs;* the engine thereafter was cut off and the cars left standing where they had so been brought to a stop, and the engine moved north over said switch and then started south onto the pasisng track with Skaggs on the side of the tender of the engine and he came in contact with the said cars from which the engine had been so uncoupled on the main line, and he was thereby injured. (Rec. 10-16 and 130.)

At the time the engine and cars were so stopped in their southward movement on the main line, Skaggs did not know the reason, neither did he know that the engine was to go back on the passing track and after so getting a signal to stop from the conductor, he went south to the station and saw the conductor and then learned for the first time that the engine was to be cut off and taken back in on the passing track, and he then returned to the engine

and found Buchta there and told him of the facts he so learned from the conductor and undertook to uncouple the engine from the cars, working on the east and engineer's side of the cars, and had difficulty to make the uncoupling, and Buchta having come up to the place from the the west side, he (Buchta) uncoupled the engine from the west side. (Rec. 9-10 and 12-15.)

When the engine so moved said cars south on the main line the last time and came to a stop, Buchta was riding the south end of the string of cars (Rec. 136-137) and says they stopped within a half car length of the street crossing, known as Division Street. (Rec. 137-138 and 145.) Buchta knew how many cars could be placed on the main line between said street crossing and said passing track switch. Rec. 154.) Buchta *also knew Skaggs was a new and inexperienced brakeman* (Rec. 135), and according to his (Buchta's) testimony he had told Skaggs to shove the cars down the main line and *"be sure and put them into clear and I will catch the rear end of the car when you shove them down"* (Rec. 135), meaning the main line (Rec. 136), and that his object in riding the rear end was to protect Division Street crossing, (Rec. 137) and that the cars came to a stop a half car length before they reached said crossing and that he gave no signal to stop, and he then got off and started over through the yards toward track four, intending to throw the switch to that track. (Rec. 137, 138 and 145-147.) From this evidence it would seem that he (Buchta) knew that if the cars were shoved down the main line far enough to clear that they would cover Division Street crossing, and for that reason it was necessary for him to ride the rear end. But notwithstanding that fact, he permitted the

cars to stop short of the crossing and started west away from them, according to his evidence, and according to Skaggs' evidence Buchta thereafter uncoupled the engine from the cars and told Skaggs the cars cleared and to go ahead with the engine as above recited.

In all of the foregoing operations the said two brakemen took part.

The passing track was on the west side of the main line; the engine was headed north; the general direction of the tracks was north and south; the fireman was not on the engine during any of said operations, he having gotten off to eat a meal at the restaurant; the engineer was on the right side of the engine, where he had to be, and operate the engine, and consequently all signals had to be given on the right side, which was the east side, and therefore Skaggs worked on the east side. (Rec. 10, 39, 154 and 157.)

Because of the darkness and his position on the east side Skaggs could not tell how close the cars were to the passing track; Buchta's position on the west side enabled him to know the nearness of said tracks to each other. (Rec. 154.) *After so cutting off the engine, and telling Skaggs the cars were into clear and to go ahead, he (Buchta) spoke of the fact that if they did not hurry they would be laid up by virtue of the sixteen-hour law, thus indicating that the work must be hurried.* (Rec. 15.)

We quote from Skaggs' testimony as to just what took place at the immediate time when the engine was so cut off and started north on the main line.

> "Q. Did you know before arriving at Amboy that there was any work, and if so, what, to be done at Amboy?
>
> A. Yes, sir, the conductor said we had two cars to

set out there. I asked him where they were, and he said, 'Two behind 7.'

Q. This was then, before you got to Amboy that he told you that?

A. That is when we left LaSalle, Illinois." (Rec. 9.)

* * * * * * * * *

"Q. Your train, then, when you were going north did come to a stop at Amboy?

A. Yes, sir, it did.

Q. Had you anything to do with the giving of the signals to stop it, or was it just stopped by the engineer?

A. We stopped there to get orders and set out two cars.

Q. Well, now, after you had stopped what was the first thing that you did?

A. *I dropped off on the platform and waited until nine cars come along, and caught the rear end of the nine cars, and when he came to a stop, why, I cut the air-hose and pulled the pin.*

Q. Cut the air-hose, pulled the pin, and then what was done?

A. Proceeded ahead.

A. That would be northward?

A. Yes, sir.

Q. With the nine cars?

A. Nine cars.

Q. What did you do then?

A. I threw the switch, and Buchta he was down on the other end while I come back with the other cars.

Q. You went north over the switch, then the engine with those nine cars stopped and you threw the switch to leave them go south on some track?

A. Yes, sir.

Q. Well, having thrown the switch, what did you do then?

A. Backing up.

Q. How did you do that?

A. I gave the signal.

Q. What were you uisng to give the signals with?

A. A lantern.

Q. You were on which side of the track at that time?

A. On the engineer's side.

Q. And that would be the right-hand side as you were facing north?

A. Yes, sir.

Q. And this track that you did go down in on, was that on the engineer's side or the fireman's side?

A. Well, it was on the fireman's side going down.

Q. That is, you went back south, then on that track it would be going on the west side of the main line which run north and south?

A. Yes, sir.

Q. You threw the switch and then you gave the back-up signal to the engineer, and he started back?

A. Yes, sir.

Q. Then what did you do?

A. *I was watching for the rear man's signals down in the yard."* (Rec. 10-11.)

* * * * * * * * *

Q. *"Were you getting signals? I understood you to say you were.*

A. *Yes, sir, I was getting signals.*

Q. *You weer getting signals from him?*

A. *Yes, sir.*

Q. *Down in the yard you said?*

A. *Certainly; I wouldn't have backed up if I hadn't.*

Q. *You wouldn't have backed up if you hadn't got a signal?*

A. *No, sir, if I hadn't got a signal from him.*

Q. *Did you know where the two cars were to be taken out?*

A. *Well, he was lining up—I didn't know the yard; he would line up, to go past the switch and come back, and everything would be lined up, and watch him.*

Q. *That was his order to you?*

A. *Yes, sir.*

Q. *And did you watch him?*

A. *I did.*

Q. *Then when you would get signals from Buchta what would you do?*

A. *I would give the signal to the engineer.*

Q. *The same signal, or not?*

A. *The same signal, yes, sir.*

Q. And you proceeded then south how far?
A. Oh, probably middle ways of the yards.
Q. And what did you do then?
A. We come to a stop and cut those cars off.
Q. Upon whose signal did you come to a stop?
A. The rear man's." (Rec. 10-11.)

The witness then gave the details as to the movement north after so cutting said two cars off and proceeds to tell of the southward movement on the main line.

"Q. You gave a signal after throwing the switch to back up, and then what?
A. The engineer back up.
Q. And where did you back to?
A. Backed down the main line towards the other cars.
Q. That is, the baalnce of your train?
A. Yes, sir.
Q. And then what?
A. *The conductor gave me a signal—I thought it was he. I really didn't know, but I went by the signal, and stopped.*
Q. *What kind of a signal did you get?*
A. *He gave me a stop signal.*
Q. *With what?*
A. *His lantern.*
Q. And what did you do then?
A. I went down to see what he wanted.
Q. Well, you repeated that signal, did you?
A. Yes, sir.
Q. And did your train come to a stop then, and did your engine and those seven cars—
A. Yes, sir, come to a stop.
Q. Then what did you do?
A. I goes down to see what he wanted.
Q. Where did you go?
A. I went to the office, to the depot.
Q. Whom did you find there?
A. I found the conductor.
Q. And what did he have to say to you?
A. *I asked him if that was him give me that signal, he says, 'Yes, we went to pick up a few cars here.'*

Q. *Who said that, now?*

A. *The conductor. He says 'Go back on the same track in there, and we will take those two where you put them in there, and we will take those out,' he says, 'and then kick those two back there in the yards."* (Rec. 12-13.)

* * * * * * * * *

"Q. Were those seven cars coupled to the balance of your train?

A. No, sir.

Q. So the time you went down to the depot office to see the conductor your engine was standing on the main line track with the seven cars attached to it that you had been handling and setting out those two?

A. Yes, sir.

Q. *Well, you say, now, after getting that order from your conductor you went back to your engine; what did you do then?*

A. *I went back to cut the engine off to go down in the yards, and the rear man was on the opposite side and asked me what I was going to do and where I went, so I told the conductor we wanted to pick up a few down on the same track where we had put in the two cars. He says, 'How many?' I says, 'I don't know, I says. He was counting the bills when I left, and said he would be over there. And so I pulled at the pin, and asked him—I was talking to him during the time, an dI didn't get the pin—"* (Rec. 13-14.)

* * * * * * * * *

"Q. *And you say you didn't get the cars uncoupled?*

A. *I told him I says, 'Look out, I am going to take a little slack and uncouple,' and he says, 'Wait a minute, I can get it over here,' and he did; he pulled the pin himself and he says, 'Go ahead.' And I starts ahead and I didn't know whether those cars were clear or not going into ½, and I asked him, and I didn't get the right answer to what I thought, and so I stops the engine and gets off the engine and asked him again, and he says, 'They are clear a mile, go ahead, and if we don't get out of here the 16-hour law will catch us before we get into Freeport."*

Q. Now, did you understand what he meant when he spoke of the 16-hour law?

A. Certainly, yes, sir.

Q. What?

A. Well, he meant if we had a tie-up on the road before we got in that we would be on the road 16 hours before we got to Freeport. We were supposed to tie up.

Q. You knew of a law that you could only work 16 hours, is that the idea?

A. Yes, sir.

Q. Tie up before you got to the end, 16 hours?

A. Yes, sir.

Q. Very well. What did you do then?

A. Well, I went ahead and throwed my switch and come back.

Q. Now, what switch was that you threw at that time?

A. That was the main line switch.

Q. This same switch you had passed over twice before?

A. Yes, sir.

Q. And what did you do after throwing the switch?

A. I gave a signal to back up.

Q. Now, that was simply the engine?

A. Yes, sir.

Q. What did you do then?

A. Well, I caught the rear end of the tank.

Q. On which side?

A. Engineer's side.

Q. That would be the east side of the main track and right-hand side facing north?

A. Yes, sir.

Q. *What did you do then?*

A. *I was backing up looking for his signal.*

Q. *Looking for whose signals?*

A. *The rear man, the flagman.*

Q. Did you know where he was?

A. I didn't know where he was only when I saw him give a signal.

Q. Go on, tell us what followed.

A. Well, I started to back, and I didn't get back very far, we hit the head car that we had cut the engine off, and I was caught between; I was caught between the tank and the car, and that knocked me off of the tank, and I fell through and the tank coupled

to the engine ran over my foot and arm." (Rec. 15-16.)

Skaggs was contradicted by Buchta but a reading of Buchta's evidence will show that his memory was either bad or he was trying to avoid telling the truth.

There was a change made in the work to be done at Amboy, such change was ordered by the conductor because he found a car known as a Freeport, that was to be put into the train, and he thereafter gave the brakeman an order changing the work; Skaggs says this was done after the cars were so shoved south on the main line the last time; (Rec. 12 and 14) Buchta first said that the said order making such change was given when the engine and cars were on the passing track, but he afterwards stated that he learned of the change after the cars had been shoved south on the main line, thus corroborating Skaggs.

After telling of the train stopping at Amboy and then being cut in two parts and that the head end moved north on the main line and he rode the same to Division Street crossing, Buchta testified as follows:

"Q. And what did you do there?

A. Well, I got off at Division street and crossed over. In the meantime Litchtenberger was over there getting his numbers, and I was going to throw No. 1 switch, and he called at me.

Q. You were going to throw No. 1 switch?

A. No. 4 switch, and he called at me.

Q. What switch?

A. No. 4 switch.

Q. What was the purpose of throwing No. 4 switch? You say you intended to do that—why?

A. Because Lichtenberger says we would go up the main line and shove our Dunbars in; that is the first he says, to shove our Dunbars in on No. 4, that whole train, you know.

Q. Now, you say you were going to throw that

switch when Litchtenberger over in the yard called to you?

A. Yes, sir.

Q. Just what occurred? What did he say?

A. Why, he says, 'We are going to make a change,' he says, 'we are going to put the two Dunbars on the lead and put the balance on the main line.' In the first place we were going to set them over on No. 4, you know, but he went there to see, there was a Freeport load there, you see." (Rec. 132.)

* * * * * * * * *

"Q. Now, after this conversation with the conductor, Mr. Lichtenberger, changing the orders on account of the Freeport on No. 6, what was the further movement of the train? That is, the train had gone on up to the switch; did the train back down?

A. Yes, sir.

Q. *Just tell us about that, where did it stop and what did you do and what do you know about it?*

A. *Well, we backed down as far as the lead, that is where we go into the yard, that is, next to the passing-track switch, and me and Mr. Stag were near together.*

Q. *Then what was done?*

A. *And I told him, Stag,—I cut the cars, and in the meantime I was telling him, now, we will cut these two Dunbars off on the lead here, and he will ride the head end up, and when he comes across I would catch it so to protect the rear end.*

Q. *Now, you say you cut the Dunbars off?*

A. *I cut the two Dunbars off."* (Rec. 133-)

* * * * * * * * *

"Q. And by cutting them off you mean pulling the pin, do you?

A. *Yes, sir, and I told Stag, 'We will set the balance on the main line, and be sure and put them into clear.' He was a new man with me and I told him to be sure and put them into clear, and 'I will catch the rear end of the cars when you shove them down the passing-track."* (Rec. 135.)

* * * * * * * * *

"Q. Just a moment ago. Now what was done? You have cut off the two Dunbars and have told Skaggs what is to be done as Lichtenberg has told

you; now, what is done then, what do you do and what does Skaggs do?

A. *Well, Skagg—I rode the rear end back, you know, and got off on the main line; Shorty—Mr. Lichtenberger—hollered at me—we made a change, you know, so I told him that we were going to leave two Dunbars on the main line—or on the passing-track, I mean to say.—*

Q. On the passing track?

A. Yes, so we cut them off and shoved the balance down the main line, you know; see?" (Rec. 136.)

* * * * * * * * *

"Q. Now, Mr. Buchta, which car did you board when the ten cars were being backed down on the main line?

A. I boarded the rear car with a white lantern.

Q. That is, what white lantern do you refer to?

A. Well, we always have a white lantern at night; the one I had.

Q. That is the lantern that the brakemen use in signaling?

A. Yes, sir.

Q. And a regulation brakeman's lantern, I take it?

A. Yes, sir.

Q. Now, how far back did that rear car move and at what point did it stop?

A. Well, it stopped right about near the crossing, about half a car length, I should judge; I don't know just exactly.

Q. Your impression is—

A. Yes, sir.

Q. About half a block?

A. Half a car.

Q. Half a car, I should say, from the nearest line of the crossing?

A. Yes, sir.

Q. And by the crossing you refer to Division street crossing?

A. Yes, sir.

Q. *When the string of cars stopped at that point what did you do?*

A. *I went over to throw No. 4 switch.*

Q. *To throw No. 4 switch?*

A. *I was going to throw No. 4 switch.*

Q. *Well, I say you went over to throw No. 4 switch—*

A. *And Mr. Lichtenberger called to me and says, 'We made a change—' No, I was going to go over to No. 4 switch and we was going to shove in the two Dunbars there on the passing-track and Stag was to cut off the engine and come around and shove the two Dunbars in on No. 4 switch."* (Rec. 138.)

BRIEF.

Claims of Plaintiff in Error.

The following subjects are discussed in plaintiff in error's brief:

1. That defendant in error, (Skaggs) was in charge of the engine at the time said cars were left standing on the main line and that he was solely responsible for the fact that the said cars were not put into clear.

2. That if the above claim is not correct that then Skaggs and rear brakeman Buchta were jointly engaged in the leaving of said cars so stand not into clear and defendant is not responsible for such joint act.

3. That defendant, Skaggs, assumed the risk of injury from said cars not having been put into clear.

4. That the trial court erred in charging the jury as to the effect of contributory negligence upon the amount of damages which palintiff could recover.

Defendant in Error's Answer to Foregoing Claims.

1. That as to the foregoing claims of plaintiff in error numbered one, two and three, they involve no Federal question and, thereforefore, the court has no authority to examine and pass upon the same.

2. That upon the merits each and all of said claims one, two and three are not well founded in fact, nor in law.

3. That as to the said fourth claim of plaintiff in error, we claim (a) that plaintiff in error is in no position to complain of the court's charge because it made no requests of the court to charge and took no exceptions to

the charge upon the trial; (b) that the charge of the court, as to contributory negligence as affecting damages, is not objectionable when all that the court said on said subject is considered; and (c) that if the charge was wrong, it was error without prejudice to plaintiff in error.

We will present our argument on the above and foregoing claims and counter claims of the respective parties in the order above stated.

I.

DO SAID CLAIMS ONE, TWO AND THREE OF PLAINTIFF IN ERROR INVOLVE ANY FEDERAL QUESTION WHICH THE COURT CAN CONSIDER?

If the court has jurisdiction over said sujects it must be because they come within the provision of Sec. 709 U. S. Compiled Statutes 1901, and evidently having said Statute in mind, plaintiff in error, in the preamble to the assignments of error accompany the petition for the writ of error, under which the record comes to the court, has recited facts, which, if true, would give the court jurisdiction.

We quote the said preamble: (Rec. 190)

> "Now comes the above named appellant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, *wherein was drawn in question the construction of a statute of the United States, to-wit: the so-called Employers' Liability Act* (Act of Congress April 22nd, 1908, 35 Stat. 65), *and the decision was against a right, privilege and immunity specially set up and claimed by appellant under said statute of the United States*, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:"

Two things must exist in order to give the court jurisdiction: First, the defendant must have *specially set up or claimed some right, privilege or immunity under said Statute, and second, the right, privilege or immunity so set up must have been denied by the state court.*

We contend that the defendant did not set up or claim any right, privilege or immunity under or by virtue of the said Employers' Liability Act which was denied it by the state courts.

Plaintiff's right to recover did depend upon the said Empolyers' Liability Act, and this by virtue of the allegations contained in plaintiff's complaint (Rec. 1-3) and a stipulation of facts made upon the trial. (Rec. 5-6.)

The defendant by its answer denied the allegations of interstate commerce contained in plaintiff's complaint and set up contributory negligence and no other fact that could be affected by said Federal law.

After plaintiff had, upon the trial, put in all his evidence and rested his side of the case, the defendant made no motion for a non-suit or dismissal nor any other motion. (Rec. 41-42.)

When the evidence was all in there was no motion made for dismissal or the direction of a verdict or for judgment and no requests were made of the court to charge the jury in any particular manner nor upon any given subject. (Rec. 156 and 158.) The court charged the jury and at the close of the charge there was no exception taken to any portion of the charge. (Rec. 163.) A motion for a new trial was thereafter made, but no motion or request or assignment of error to the effect that judgment ought to be or should be entered in defendant's favor notwithstanding the verdict of the jury. (Rec. 168-171.)

The case was then removed to the Supreme Court of Minnesota by appeal and no assignment of error was there made which raised the question or claimed the right on behalf of defendant to have judgment entered in its favor. (Rec. 173-176.)

Hence the plaintiff in error did not specially set up any right, privilege or immunity under or by virtue of said Employers' Liability Act, and the state court did not, therefore, deny it any right, privilege or immunity, save and except the possible claim as to contributory negligence which we will hereafter separately consider.

In answer to the foregoing, it may be said that in the said motion for a new trial, and in the assignment of errors in the Supreme Court of Minnesota, it was claimed that the verdict of the jury was not supported by the evidence and that that was the making of a claim to a right or privilege or immunity under said law. But this only raised the question of the weight of the evidence and did not raise the question of there being no evidence in the case warranting the trial judge in charging the jury that the said Employers' Liability Act applied to the case.

The court cannot review the evidence merely for the purpose of determining on which side of the case the greater weight of the evidence is.

Dower v. Richards, 151 U. S. 658, 14 S. C. Rep. 452.

Bartlett v. Lockwood, 160 U. S. 368, 16 S. C. Rep. 334.

Egan v. Hart, 164 U. S. 180, 17 S. C. Rep. 300.

Thayer v. Spratt, 189 U. S. 346, 354, 23 S. C. Rep. 576.

Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Popplar, 236 U. S. 369, 35 S. C. Rep. 609.

Seaboard Air Line Ry. Co. v. Padgett, 236 U. S. 668, 35 S. C. Rep. 481.

1. The question as to whether Skaggs was solely in charge of the engine and solely responsible for said cars not having been put into clear must be determined by the evidence in the case and that only, and its determination does not involve any construction of or the use of said Employers' Liability act in any manner whatsoever.

Hence in the answering of that question the state court did not deny defendant any right or privilege or immunity set up by it under the said Federal law.

2. The same thing is true of the contention that Skaggs and Buchta were jointly engaged in setting out said cars on the main line and leaving them where they did not clear. That is a matter of fact to be determined solely by the evidence and for the reasons above stated, involves no Federal question under said Employers' Liability Act.

3. As to the said third claim of plaintiff in error, which is that Skaggs assumed the risk of injury from the cars so left standing on the main line, it would seem that argument was not necessary thereon for the reason that at no time or place and in no manner during the proceedings had in the state courts did plaintiff in error make mention of assumption of risk let alone set it up or make any claim by virtue of it. It was, therefore, surely not denied a rigth which it did not claim.

Assumption of risk is an affirmative defense requiring that it be pleaded in defendant's answer and no mention is made thereof in defendant's answer.

Skow v. Dahl Punctureless Tire Co., 129 M. 324.

4. As to the question of contributory negligence involving a Federal question for consideration by the court

we concede that the charge of the court to the jury did involve the construction of the said Employers' Liability Act and that, therefore, in a proper case the said charge might be reviewed as a Federal question on that subject; but our claim is that defendant did not set up or claim any right or privilege or immunity on that subject which was denied it.

It is not claimed that contributory negligence should have defeated plaintiff in recovering anything but the claim is that the court gave the wrong rule for the reduction of damages under said Federal law.

As already stated, defendant made no request of the court to charge the jury and took no exception to the charge as given; hence it set up no right or privilege or immunity as to the said question of reduction of damages because of contributory negligence and was, therefore, not denied any such right, privilege or immunity.

It is not sufficient that plaintiff in error failed to secure a right, privilege or immunity which it might have had; it must be a right or privilege or immunity which it specially set up and claimed in the state court and we take it that it must be so set up and claimed at the proper time and in a proper manner.

To be effective, the proper time to have had the court consider this question of reduction of damages was when the court was charging the jury, and either by a request to charge or by an exception to the charge as given.

This was the orderly and customary way of doing it.

Waligora v. St. Paul Foundry Co., 107 M. 554-559.

> "In the second place—and what is of conclusive force—in the federal court, in accordance with common-law practice, exceptions to the charge are taken

before the jury retires. In this state, under the statute, exceptions may be taken subsequently. To avoid unnecessary mistrials, and to render futile the objectionable 'quest for error,' this court has established a plainly proper rule which has been repeatedly followed, viz: 'The firmly established practice in this state requiring counsel on the trial of an action to call attention to obviously unintentional mis-statements and verbal errors in the charge of the court to the jury, if deemed at all likely to be misleading, was not abrogated by the passage of Laws 1901, C. 113,' etc. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754."

State v. Zempel, 103 M. 428-429.

"If the defendant was not satisfied with the instructions given by the court, he should have submitted such requests for instructions as he desired. Where no requests for instructions are made, it is not reversible error for the court to fail to instruct upon any particular issue. Mobile Fruit & Trading Co. v. Potter, 78 Minn. 487, 81 N. W. 392. This rule—like that which makes it incumbent upon a person to call the attention of the court to errors in the charge which are the result of mere overisght or inadvertence, which is thoroughly established in civil cases—applies equally in criminal cases."

This rule was reaffirmed in a very recent case of the Supreme Court of Minnesota.

Smith v. Great Northern Ry., 153 N. W. 513.

Not having specially set up or claimed a right or privilege or immunity as to the proper rule for reduction of damages because of contributory negligence, plaintiff in error cannot claim that it was denied any right, privilege or immunity with reference thereto and hence the court has no authority to examine into or pass upon what the state court did or failed to do on that subject.

Hence we ask that the writ of error be dismissed.

II.

But if the court should determine that it can review the evidence on the said questions, then in that event, it is our claim that the evidence abundantly justified the state court's decision.

Skaggs Was Not Responsible for His Own Injury.

So far as the disputed facts of the case are concerned Skaggs is entitled to the most favorable construction and application of the evidence in the case, and with that understanding, we heretofore stated the facts disclosed by the evidence on the question of how the accident happened, the same showing that Skaggs and Buchta both worked at the uncoupling of the engine from the cars; Buchta was successful in making the uncoupling, Skaggs was not. Buchta was the oldest man in the service of defendant as a brakeman, and was rear brakeman because thereof, and by reason thereof, he assumed to give directions to Skaggs. Skaggs was not acquainted with the railway tracks at Amboy, Buchta was; *Skaggs did not know whether the cars would clear or not and asked Buchta, who was in a position to know, whether they would clear and was told they would, and then Buchta told Skaggs to go ahead, and called Skaggs' attention to the fact that they must hurry because of the sixteen-hour law.* Skaggs was working on the east side of the main line and because thereof could not see whether the cars cleared or not; Buchta was on the west side where he could see if they cleared. The work was being hurried in the dark on a cold, windy night. (Rec. 7, 16, 135, 137, 153-154 and 157.)

According to the testimony of Buchta he told Skaggs to be sure and shove the cars down the main line to clear and he then rode the rear end of the cars for the purpose of protecting Division Street crossing, thus showing that he understood that if the cars did clear they would have to pass over Division Street, and the cars stopped a half car length away from Division Street crossing. (Rec. 135-138.)

Buchta knew how many cars could be placed on the said main line between said crossing and said switch. (Rec. 154.) He presumably knew that in order that said cars clear they would have to be shoved over said crossing as that was his reason for riding the rear end; yet according to his evidence he said and done nothing as to said cars having stopped before reaching the crossing, and he thereafter, according to Skaggs, uncoupled the engine from the cars and told Skaggs to go ahead.

These facts show the very opposite of defendant's said claim; they show that Buchta was solely responsible for the leaving of the cars where they were left and for the subsequent movement of the engine as it was moved.

Claim That Skaggs and Buchta Acted Jointly.

What we have said above is our answer so far as the facts are concerned to this second contention that Skaggs and Buchta were acting jointly and, therefore, the defendant is not liable.

But if, for sake of argument, we assume that Skaggs and Buchta were jointly engaged in said work, that does not relieve the defendant from liability, for Buchta's part of the work. Buchta actually did cut the engine from the cars; Buchta assumed to know that the cars cleared

and that the engine should go ahead; Skaggs did not participate in determining that the cars cleared and that the engine should go ahead.

We do not understand that it is the law that where several employees are jointly engaged in operating a train, as they always are, that because one is injured through the careless operation or handling of the train, there can be no recovery. We understand just the opposite, and that the Federal Law applicable in this case was passed for the very purpose of creating a liability under such circumstances, and that the provisions of said Federal Statute with reference to contributory negligence, takes into account the very claim that is now made and provides for a liability under the exact conditions which plaintiff in error claims should defeat recovery. In providing that contributory negligence shall not defeat recovery, the Statute assumes that the injured servant was jointly engaged in the work which caused the injury. It seems to us that plaintiff in error's contention as to joint work of Skaggs and Buchta preventing recovery is wholly without merit.

Assumption of Risk.

Plaintiff recovered solely upon the claim that Buchta was negligent in the matter of leaving said cars upon the main line too close the switch, in other words, not into clear.

Skaggs did not know whether the cars cleared or not, and he asked Buchta, who was in a position to know, whether they cleared and was assured they did clear and was told to go ahead.

Inasmuch as Skaggs did not know that Buchta's statement was not true, he could not be held to assume the risk of injury due to the fact that the cars did not clear.

Central Vermont R. Co. v. White, 238 U. S. 507, 35 S. C. Rep. 765.

We quote from this case as follows:

> "Complaint is made because the court failed to instruct the jury as to the law respecting assumption of risk.
>
> "But there was not only no request to charge on that subject but there is no evidence that White knew of the negligence of the agent in giving a 'clearance card' or of the leaking cylinder which obscured the vision of the engineer. He did not assume the risk arising from unknown defects in engines, machinery or appliances while the Statute abolishes the fellow servant rule."

The following case is of special interest because of its similarity to some of the facts in the case at bar and the law of the case is specially applicable on the question of assumption of risk.

Yazoo & Miss. Valley R. R. Co. v. Wright, 235 U. S. 375, 35 S. C. Rep. 130.

We quote from the case as follows:

> "The engineer asked the fireman, who was on the left side of the engine, and therefore in full view of the cars, whether they were clear of the lead track, and was answered that they were." * * *
>
> "Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent, since the facts as stated absolutely preclude all inference that the engineer knew, or, from the facts shown, must be presumed to have known, that the coal cars were protruding over the track on

which he was moving, and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train."

We also cite the following cases on the same subject:

Gila Valley G. & N. R. Co. v. Hall, 232 U. S. 94, 34 S. C. Rep. 229.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 34 S. C. Rep. 635.

Tex. & P. Ry. Co. v. Harvey, 228 U. S. 319, 33 S. C. Rep. 518.

III.

CONTRIBUTORY NEGLIGENCE AS AFFECTING AMOUNT OF DAMAGES RECOVERABLE.

The plaintiff in error complains of the trial court's charge to the jury on the effect that contributory negligence should have upon the amount of damages recoverable.

(*a.*) As heretofore noted, no instructions of any kind were requested by defendant and no exceptions were taken at the time of the trial and the trial court's attention was not, in any manner, at the time of the trial, called to the matters now complained of. Under these circumstances the plaintiff in error should not now be heard to complaint of the court's charge.

The case of Norfolk Ry. Co. v. Earnest, 229 U. S. 114, is in point and in favor of defendant in error.

(*b.*) The court in its charge several times called attention to the true rule for reduction of damages and the use of the words "in comparison with the negligence of the de-

fendant" was inadvertent and no doubt would have been corrected if the court's attention had been called to the same. We here quote all the court said on the subject of damages in its charge affecting the question of contributory negligence:

> "The federal law to which I have called your attention contains this further provision,—and I quote from the law: 'That in all actions hereafter brought against any common carrier by railroad under this act to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.' That rule changes the rule in Minnesota courts with reference to the effect of contributory negligence. Under the common law in actions such as this if the plaintiff was guilty of contributory negligence, if the plaintiff was himself at fault in bringing upon himself the injury sustained, then he would not be entitled to recover in any amount; but this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury that he will, notwithstanding that, *be entitled to recover a proportionate amount of the total injury sustained.* His negligence (if he was negligent) would be taken into consideration, and that a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you. *The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it*

should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame. So, besides determining whether the defendant, under the instructions which I have given you, was negligent, you are further to determine whether the plaintiff was himself negligent and whether that negligence (if you find there was such on the part of the plaintiff) contributed to the cause of this injury, *and then if you find that he was negligent in any degree you will apply the rule as I have stated it to you under this federal statute to which I have called your attention.*"

* * * * * * * * *

"In determining the question of damages—if you reach that point in the case, if you believe that the plaintiff is, under the testimony and under the instructions which I have given you, entitled to recover anything at all in this action—you will determine the amount which he is entitled to recover by the exercise of your best judgment, and if you find that he is entitled to recover at all, give him that amount, find in your verdict such amount as you believe will fairly and justly compense him for the injuries which he has sustained."

* * * * * * * * *

"If, however, you reach the conclusion from all of the testimony that the employe Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you."

It will be observed that the charge was mainly correct; it does state the true rule of law, but in repeating or going over the subject the court made a wrong comparison.

But the jury could not be mistaken as to the charge meaning the true rule of law.

(c.) But if the jury did disregard or misunderstand the correct portion of the charge and follow the erroneous portion, defendant could not be prejudiced thereby; it would be the plaintiff that would suffer from the jury following said erroneous rule.

For illustration we will assume that the jury, following the said erroneous instructions, found that plaintiff was guilty of negligence and as compared with defendant's negligence it was one-half as great, the jury would then reduce the damages one-half; but if the jury had followed the correct rule, they should have reduced the damages in the proportion that plaintiff's negligence bore to the combined negligence of both parties and in that event, they would have reduced the damages only one-third, as the combined negligence was one part plaintiff's and two parts defendants.

Hence we repeat that the instruction complained of was injurious to the plaintiff and beneficial to defendant.

The manner in which the Supreme Court of Minnesota disposed of the claim that the charge of the trial court was wrong we think is not subject to criticism and was not error and did not deprive defendant of any lawful right or privilege. We quote from the said decision of the Supreme Court of Minnesota as follows: (Rec. 179 180)

> "Defendant complains of the court's construction of the Federal Act, as indicated by the foregoing excerpts, citing and relying on Norfolk etc. R. Co. v. Earnest, 229 U. S. 114, decided since the trial of the present case. Therein the Supreme Court of the United States considered, for the first time, the correctness of an instruction upon the provision of the

federal act in question, and criticised a charge similar to the one here involved; it not appearing, however, whether reversal on account thereof would have followed had proper exception been taken. Said the court, at page 121, after approving prior portions of the charge:

'But for the use in the second instance of the additional words "as compared with the negligence of the defendant" there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read "as compared with the combined negligence of himself and the defendant." We say this because the statutory direction that the diminuation shall be "in proportion to the amount of negligence attributable to such employe" means, and can only mean, that, where the casual negligence is partly attributable to him and partly to the carrier he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. * * * Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant."

"In view of this authoritative pronouncement, it is apparent that the instruction complained of was technically erroneous; but we are satisfied that upon the whole instruction no prejudice to defendant resulted. Order affirmed."

We respectfully submit that the judgment of the Supreme Court of Minnesota should be affirmed.

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_____,

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ILLINOIS CENTRAL RAILROAD COMPANY *v.* SKAGGS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 194. Argued January 19, 20, 1916.—Decided January 31, 1916.

Where two employees of the carrier are necessarily working together, as under the exigencies existing in this case, each has a reasonable latitude in relying upon statements of the other made in the course of and as a part of the operation, and if statements made negligently by one result in injury of the other properly relying thereon, the latter is not barred from recovering under the Employers' Liability Act.

The salutary rule, that a party is not entitled to sit silent until after verdict, and then insist that it shall be set aside because the trial court failed to particularly specify in its charge some matter to which its attention had not been suitably called, has not been altered by the local statute of Minnesota under which errors in rulings and instructions may be specified on a motion for new trial without taking exceptions on the trial.

This court concurs in the view expressed by the state Appellate Court to the effect that an instruction on the question of contributory

negligence of the plaintiff did not conform exactly to the proper interpretation of the Employers' Liability Act, but that as the mistake was a verbal one which would undoubtedly have been corrected had attention been called thereto at the time, which was not done, and as defendant was not prejudiced thereby, it was not error justifying reversal of the judgment.
125 Minnesota, 532, affirmed.

THE facts, which involve the construction and application of the Federal Employers' Liability Act, and the validity of a verdict and judgment recovered thereunder in a state court, are stated in the opinion.

Mr. W. S. Horton, with whom *Mr. Blewett Lee* was on the brief, for plaintiff in error.

Mr. Humphrey Barton, with whom *Mr. John H. Kay* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment recovered under the Federal Employers' Liability Act. There is no question but that the defendant in error, Fulton M. Skaggs, was injured while he was engaged in interstate commerce in the course of his employment by the plaintiff in error. It is contended that the state court erred in its application of the statute to the facts, both with respect to the conditions of liability and the measure of damages.

Skaggs had been employed by the Company for about four years, first in connection with the building and repair of bridges, and then, for about two years, as a locomotive fireman. A few days before the accident he began work as a brakeman on a freight train, his first run being from Freeport to Clinton, Illinois, on January 10, 1913. It was on the return trip to Freeport, on January 13, 1913, that he was injured. The crew consisted of the conductor, the engineer, the fireman, the rear brakeman, named Buchta,

and Skaggs who was head (or forward) brakeman. There was evidence that Buchta was assigned to the position of rear breakman because of his greater experience. The train reached Amboy, an intermediate station, about two o'clock A. M. It was a dark, cold night. There were fifteen cars in the train, two of which were to be left at Amboy. The train was cut immediately behind these two cars; the engine with the forward string of cars proceeded northward on the main track to a point beyond a switch connecting with a passing track to the west; and the two cars were then pushed back on the passing track and cut off. The engine with the remaining cars then returned to the main track and backed down in the direction of the cars which had been left standing on that track. After backing a short distance, the engine was stopped, was uncoupled, and was moved forward alone across the switch leading to the passing track, the purpose being to return to the passing track and from thence to proceed to a further track to the west in order to pick up certain other cars which were to be put into the train. There had not been left, however, a safe clearance for the engine, and, when the engine backed to the passing track, Skaggs who was riding on the right side at the rear of the tender was hit by the end of the foremost car left on the main track, was knocked to the ground and was run over, this being the injury of which he complains.

While there is little or no dispute as to these facts, there is a conflict of testimony as to the relation of Buchta, the other brakeman, to the occurrence. Omitting various details of the movements which for the present purpose need not be considered, and taking the testimony of Skaggs which the jury was at liberty to believe, these facts appear: When, after leaving the two cars on the passing track, the engine with the remaining string of cars returned to the main track and backed down, Skaggs gave the signal to stop, repeating a signal which was received, as he

supposed, from the conductor. At that time Buchta was somewhere in the yard (he had been lining up switches for the intended movements) but Skaggs did not see him when the cars were stopped. Skaggs then went to the depot to ascertain the meaning of the signal and was told by the conductor that it was necessary to pick up certain other cars. Returning to the engine, he attempted to uncouple it from the right-hand side but found this difficult, and Buchta who was then on the opposite side effected the uncoupling and said "Go ahead." On Skaggs' signal, the engine started forward; but Skaggs did not know whether the cars were left so as to give sufficient clearance for an engine going into the passing track and asked Buchta as to this. He did not receive a satisfactory answer; he stopped the engine, got off, and again asked Buchta who replied: "They are clear a mile, go ahead, and if we don't get out of here the sixteen-hour law will catch us before we get into Freeport." Skaggs at that time was on the track at the rear of the tender and not more than a car's length from the standing car. He then got on the engine, rode up to the switch, threw the switch, gave the back-up signal, stepped on the corner of the tender and was looking back for any signal that might be given by the other brakeman when he was caught between the rear right-hand side of the tender and the end of the standing car, as already stated.

It is contended that the state court erred in permitting a recovery under the Federal statute for the reason that the injury resulted from Skaggs' own act, or from an act in which he participated. The company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents or employees of the employing carrier or

by reason of any defect or insufficiency, due to its negligence, in its property or equipment. April 22, 1908, 35 Stat. 65. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a co-employee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury the statute expressly provides that it "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." See *Second Employers' Liability Cases*, 223 U. S. 1, 49, 50; *Seaboard Air Line* v. *Tilghman*, 237 U. S. 499, 501. We think that the argument for the plaintiff in error overlooks the inferences of fact which the jury was entitled to draw. Thus, the jury could properly regard the two brakemen as assisting each other in the movement in question. Such assistance was certainly appropriate, if not absolutely necessary. The very purpose of having two brakemen was not to put upon either the entire responsibility. Working together under the exigencies of such operations, particularly when conducted in the night time, it was manifestly contemplated that the one brakeman would supplement the other and not be compelled at the peril of his rights personally to examine what the other did or the basis of the reports the other gave. Each had a reasonable latitude in relying upon the statements of the other made in the course of the operation and as a part of it. The Supreme Court of the State said: "It was

a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto." In this we find no error. When the engine was uncoupled, Skaggs was on the right-hand side, while Buchta was on the other side,—the side of the passing track—a better place to judge the clearance. The fact that Skaggs asked his questions is itself not without significance. These questions indicated doubt on Skaggs' part, while Buchta's reply showed certainty on his. It was plainly permissible to infer from the testimony that the two men were not in positions of equal advantage, and Skaggs was entitled to the exercise of reasonable care on the part of Buchta in observing and reporting the position of the cars. As there was evidence upon which it could be found that Buchta was negligent, and that thereby injury resulted to Skaggs, it cannot be said that the recovery in this aspect of the case was contrary to the statute.

But it is urged that the trial court erred in its instructions to the jury. After stating that if any employee "was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant . . . would be liable for that negligence," and after referring to the "direct conflict of testimony" with respect to what was said and done by Buchta, the trial court charged as follows: "Did the employee Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company. You must determine this question of fact from all of

the testimony in the case." It was added, in substance, that if Buchta did not fail to exercise reasonable care the plaintiff was not entitled to recover. It is contended that the trial court erred in failing to qualify the instruction quoted, and other statements to the same effect, by reference to what Skaggs himself did, knew, or was in a position to know. But in view of the state of the testimony, and the point to which the court's instruction was addressed, we cannot say that it was in itself erroneous. If the plaintiff in error desired any addition, amplification or qualification in order to present its point of view to the jury it should have made appropriate request therefor. The record does not show that the plaintiff in error either objected at the time to any statement made by the court to the jury or that it made any request whatever for instructions. While under the local statute (General Statutes, Minnesota, § 7830), the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the trial court, we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called. *State* v. *Zempel*, 103 Minnesota, 428, 429; *Waligora* v. *St. Paul Foundry Co.*, 107 Minnesota, 554, 559; *Sassen* v. *Haegle*, 125 Minnesota, 441; *State* v. *Sailor*, 153 N. W. Rep. (Minn.) 271; *Smith* v. *Great Northern Ry. Co.*, 153 N. W. Rep. (Minn.) 513. This, also, is a sufficient answer to the complaint of the failure of the trial court to charge the jury with respect to assumption of risk. There was no request for any instruction upon this point. So far as these criticisms are concerned, we are unable to say that any asserted Federal right was denied by the state court.

The remaining question is with respect to the instructions of the trial court on the subject of contributory negligence. In the course of these the court fell into the error of saying that, if Skaggs was negligent, "a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you" (the jury); and, again, that the jury should "take into consideration his negligence in comparison with the negligence of the defendant." But the court read t' applicable provision of the statute to the jury and also said: "The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame." And no request was made for a correction of the first-mentioned parts of the charge. It was recognized by the Supreme Court of the State that those parts failed to conform to the correct interpretation of the statutory rule as defined in *Norfolk & Western Rwy.* v. *Earnest*, 229 U. S. 114, 122, and the court quoted what we there said, as follows: "But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read 'as com-

pared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. . . . Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant."

The state court concluded that 'upon the whole instruction no prejudice to defendant resulted.' And in this view we concur.

Judgment affirmed.

FRANK CROCKER, TRUSTEE IN BANKRUPTCY